



United States Attorneys' Manual

Land and Natural Resources Division

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UNITED STATES ATTORNEYS' MANUAL
TITLE 5--LAND AND NATURAL RESOURCES DIVISION

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5-1.000 THE LAND AND NATURAL RESOURCES DIVISION

5-1.001 Establishment

The Public Lands Division of the Department of Justice was created on November 16, 1909 (Circular No. 114); it was given the name of Lands Division in 1933 (Order 2507, December 30, 1933), and was designated the Land and Natural Resources Division on October 18, 1965.

5-1.100 AREA OF RESPONSIBILITY

5-1.110 General

The Land and Natural Resources Division administers on behalf of the Attorney General litigation relating to:

A. All civil cases and matters relating to acquisition, management, control, protection, use and disposition, by the United States, its agencies, officers, or contractors, of federally owned land and natural resources within the territorial limits of the United States, on or over the Outer Continental Shelf of the United States, and, to the extent permitted by international law, on or under the high seas;

B. All civil cases and matters in which the United States asserts, on behalf of Indian individuals and tribes, rights to property, including hunting and fishing and water rights, as well as any other natural resource interests of Indians and Indian tribes; and

C. All civil and criminal cases and matters relating to the control and abatement of sources of pollution, and the protection generally of the physical environment.

More specifically, responsibilities of the Land and Natural Resources Division, as set forth in 28 C.F.R. §0.65, embrace the following:

Subject to the general supervision of the Attorney General, and under the direction of the Deputy Attorney General for criminal matters, and the Associate Attorney General for all other matters, the following functions are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General in charge of the Land and Natural Resources Division:

A. Civil suits and matters in federal and state courts and administrative tribunals, by or against the United States, its agencies, officers, or

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contractors, or in which the United States has an interest, whether for specific or monetary relief, and also nonlitigation matters, relating to:

1. The public domain lands and the Outer Continental Shelf of the United States;

2. Other lands and interests in real property owned, leased, or otherwise claimed or controlled, or allegedly impaired or taken, by the United States, its agencies, officers, or contractors, including the acquisition of such lands by condemnation proceedings or otherwise;

3. The water and air resources controlled or used by the United States, its agencies, officers, or contractors, without regard to whether the same are in or related to the lands enumerated in subparagraphs 1 and 2 of this paragraph; and

4. The other natural resources in or related to such lands, water and air, except that the following matters which would otherwise be included in such assignment are excluded therefrom:

a. Suits and matters relating to the use or obstruction of navigable waters or the navigable capacity of such waters by ships or shipping thereon, the same being specifically assigned to the Civil Division;

b. Suits and matters involving tort claims against the United States under the Federal Tort Claims Act and special acts of Congress, the same being specifically assigned to the Civil Division;

c. Suits and matters involving the foreclosure of mortgages and other liens held by the United States, the same being specifically assigned to the Civil and Tax Divisions according to the nature of the lien involved;

d. Suits arising under 28 U.S.C. §2410 to quiet title or to foreclose a mortgage or other lien, the same being specifically assigned to the Civil and Tax Divisions according to the nature of lien held by the United States, and all other actions arising under 28 U.S.C. §2410 involving federal tax liens held by the United States, which are specifically assigned to the Tax Division;

e. Matters involving the immunity of the federal government from state and local taxation specifically delegated to the Tax Division by §0.71.

B. Representation of the interests of the United States in all civil litigation in federal and state courts, pertaining to Indians, Indian

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tribes, and Indian affairs, and matters relating to restricted Indian property, real or personal, and the treaty rights of restricted Indians (except matters involving the constitutional and civil rights of Indians assigned to the Civil Rights Division by subpart J. of this part).

C. Rendering opinions as to the validity of title to all lands acquired by the United States, except as otherwise specified by statute.

D. Civil and criminal suits and matters involving air, water, noise, and other types of pollution, the regulation of solid and hazardous wastes, toxic substances, pesticides, and the control of the environmental impacts of surface coal mining.

E. Civil and criminal suits and matters involving obstructions to navigation, and dredging or filling (33 U.S.C. §403).

F. Civil and criminal suits and matters arising under the Atomic Energy Act of 1954 (42 U.S.C. §2011 et seq.) insofar as they relate to the prosecution of violations committed by a company in matters involving the licensing and operation of nuclear power plants.

G. Civil and criminal suits and matters relating to the natural and biological resources of the coastal and marine environments, the Outer Continental Shelf, the fishery conservation zone and, where permitted by law, the high seas.

H. Criminal suits and civil penalty and forfeiture actions relating to wildlife law enforcement under the Endangered Species Act of 1973 (16 U.S.C. §§1531-1543); the Lacey Act (16 U.S.C. §3371 et seq.); the Airborne Hunting Act (16 U.S.C. §724(j)-(1)); the Migratory Bird Act (16 U.S.C. §701 et seq.); the Wild Horses and Wild Burros Act (16 U.S.C. §§1331-1340); the Bald and Golden Eagle Protection Act (16 U.S.C. §§668 (a)-(d)); and the Fish and Wildlife Coordination Act (16 U.S.C. §661 et seq.).

I. Performance of the Department's functions under §706.5 of the regulations for the prevention of conflict of interests promulgated by the Secretary of the Interior under the authority of the Surface Mining Control and Reclamation Act of 1977, section 201 (f), 91 Stat. 450, and contained in 30 C.F.R. Part 706.

J. Conducting the study of processing sites required by section 115(b) of the Uranium Mill Tailings Radiation Control Act of 1978, publishing the results of such study and furnishing the results thereof to the Congress and, based on such study, determining and taking whatever actions, if any, shall be appropriate and in the public interest to require payment by such persons as the study identifies, of all or any part of the costs incurred by

the United States for such remedial action for which he determines such persons are liable.

5-1.111 Litigation Involving Environmental Protection Agency

With respect to any matter assigned to the Land and Natural Resources Division in which the Environmental Protection Agency is a party, the Assistant Attorney General in charge of the Land and Natural Resources Division, and such staff as he/she may specifically designate in writing, are authorized to exercise the functions and responsibilities undertaken by the Attorney General in the Memorandum of Understanding between the Department of Justice and the Environmental Protection Agency (42 Fed. Reg. 48942), except that Subpart Y of 28 CFR Part 0 shall continue to govern as authority to compromise and close civil claims in such matters.

5-1.120 Statutes Administered

The statutes administered by the Division are listed in USAM 5-2.120, 5-3.111, 5-4.120, 5-5.120, 5-6.120, 5-7.120, 5-9.120 and 5-10.120, infra.

5-1.200 ORGANIZATION

5-1.210 General

The Division is administered by an Assistant Attorney General, who is assisted by three Deputy Assistant Attorneys General.

5-1.220 Litigating Sections

The litigating functions of the Division are discharged through nine sections:

A. The Environmental Defense Section (described in detail in USAM 5-2.000, infra);

B. The Environmental Enforcement Section (described in detail in USAM 5-3.000, infra);

C. The Land Acquisition Section (described in detail in USAM 5-4.000, infra);

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D. The Indian Resources Section (described in detail in USAM 5-5.000, infra);

E. The Indian Claims Section (described in detail in USAM 5-6.000, infra);

F. The General Litigation Section (described in detail in USAM 5-7.000, infra);

G. The Appellate Section (described in detail in USAM 5-8.000, infra);

H. The Policy, Legislation and Special Litigation Section (described in detail in USAM 5-9.000, infra); and

I. The Wildlife and Marine Resources Section (described in detail in USAM 5-10.000, infra).

5-1.230 Support Units

Policy planning, legislative and special activities are assigned to the Policy, Legislation and Special Litigation Section (described in detail in USAM 5-9.000, infra).

5-1.300 SUPERVISION AND HANDLING OF LAND AND NATURAL RESOURCES DIVISION
CASES

5-1.301 General

All cases within the area of responsibility of the Land and Natural Resources Division are subject to the supervision and control of the Assistant Attorney General in charge of the Land and Natural Resources Division. As is hereinafter more fully set forth, the responsibilities for direct handling of cases are divided into four general classifications: (1) cases for which authority has been delegated to the U.S. Attorneys which may be directly referred to him/her by an authorized field officer or a federal department or agency, see USAM 5-1.310, infra; (2) cases which are delegated to the U.S. Attorneys by the Assistant Attorney General of the Division for which the U.S. Attorneys are assigned primary responsibility, see USAM 5-1.323, infra; (3) cases which the Assistant Attorney General of the Division determines shall be the joint responsibility of the Division and the U.S. Attorney, see USAM 5-1.324, infra; and (4) cases for which the Division retains primary responsibility, see USAM 5-1.325, infra.

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5-1.302 Pleadings to be Signed by the Assistant Attorney General

In all civil cases where the United States is a plaintiff, other than direct referral cases, see USAM 5-1.410, infra, and specific cases or classes of cases the Assistant Attorney General exempts from this requirement, arising from matters in the litigating sections, all complaints, stipulations or agreements for entry of judgment or dismissal shall be signed, prior to filing, by the Assistant Attorney General.

5-1.310 Authority of U.S. Attorneys to Initiate Actions Without Prior Authorization, i.e., Direct Referral Cases

Actions which may be initiated by the U.S. Attorneys without prior authorization from the Land and Natural Resources Division are listed in Land and Natural Resources Division Directive No. 8-80, amending Division Directive No. 7-76 (41 Fed. Reg. 53660). The pertinent portion of the amended Directive is as follows:

By virtue of the authority vested in me by Part 0 of Title 28 of the Code of Federal Regulations, and particularly Sections 0.165, 0.160, 0.162, 0.164, 0.166, and 0.168 thereof, I hereby redelegate to the Deputy Assistant Attorney General, certain Section Chiefs and to the U.S. Attorneys the following authority to act in connection with, and to compromise, Land and Natural Resources Division cases:

Section I - AUTHORITY TO INITIATE CASES

A. Delegation to U.S. Attorneys

1. Land Cases U.S. Attorneys are hereby authorized to act in matters concerning real property of the United States, including tribal and restricted individual Indian land, not involving new or unusual questions or questions of title or water rights, on behalf of any other department or agency in response to a direct request in writing from an authorized field officer of the department or agency concerned, without prior authorization from the Land and Natural Resources Division, in the following described cases:

a. Actions to recover possession of property from tenants, squatters, trespassers or others, and actions to enjoin trespasses on federal property:

b. Actions to recover damages resulting from trespasses when the amount of the claim for actual damage based upon an innocent trespass does not exceed \$200,000 (the U.S. Attorneys may seek recovery of amounts exceeding \$200,000 (i) if the actual damages are \$200,000 or less and state statutes permit the recovery of

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multiple damages, e.g., double or treble, for either a willful or an innocent trespass; or (ii) if the actual damages are \$200,000 or less, but the action is for conversion to obtain recovery of the enhanced value of property severed and removed in the trespass;

c. Actions to collect delinquent rentals or damages for use and occupancy of not more than \$200,000;

d. Actions to collect costs of forest fire suppression and other damages resulting from such fires if the total claim does not exceed \$200,000;

e. Actions to collect delinquent operation and maintenance charges accruing on Indian irrigation projects and federal reclamation projects of not more than \$200,000;

f. Actions to collect loans of money or livestock made by the United States to individual Indians without limitation on amount, including loans made by Indian tribal organizations to individual Indians if the loan agreements, notes and securities have been assigned by the tribal organizations to the United States; and

g. Actions to recover damages resulting from breach of a timber sale contract when the amount of the claim does not exceed \$200,000.

2. Environmental Cases Pursuant to Paragraph 10 of the Memorandum of Understanding between the Department of Justice and the Environmental Protection Agency (42 Fed. Reg. 48942) with respect to the handling of litigation to which the Environmental Protection Agency is a party, all requests of the Environmental Protection Agency for litigation must be submitted by the Agency through its General Counsel or its Assistant Administrator for Enforcement to the Assistant Attorney General, except that matters requiring an immediate temporary restraining order may be submitted by Regional Administrators of the Environmental Protection Agency simultaneously to a U.S. Attorney and the Assistant Attorney General. Consequently, except for matters requiring an immediate temporary restraining order, U.S. Attorneys are not authorized to accept on a direct reference basis any matters or cases originating in any office of the Environmental Protection Agency.

U.S. Attorneys are authorized to act without prior authorization from the Land and Natural Resources Division, on behalf of federal departments or agencies other than the Environmental Protection Agency, in response to a direct request in writing from an authorized field officer of the department or agency concerned (a copy of said request is to be forwarded forthwith to

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the Assistant Attorney General, Land and Natural Resources Division by the U.S. Attorney) in the following environmental cases:

a. Civil or criminal actions involving the filling or the deposit of dredged or fill material upon, or the alteration of the channels of, the waters of the United States, in violation of Section 10 of the River and Harbor Act of March 3, 1899 (33 U.S.C. §403), or of Section 404 of the Federal Water Pollution Act Amendments of 1972 (33 U.S.C. §1344) or of both statutes;

b. Civil or criminal actions involving the discharge of refuse into the navigable waters of the United States, and, in certain cases, their tributaries, in violation of Section 13 of the Act of March 3, 1899 (33 U.S.C. §407), except for

(i) in rem actions against vessels, which actions shall continue to be handled in the manner set forth in Departmental Memorandums 374 and 376, dated June 3, 1964, and shall continue to be under the jurisdiction of the Civil Division; and

(ii) criminal actions involving the discharge either of oil or of hazardous substances, for which discharge a government agency either has imposed a civil penalty pursuant to Section 311(b)(6) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1321 (b)(6)), or has under consideration the imposition of such a penalty.

3. Wildlife and Marine Resources Cases U.S. Attorneys are hereby authorized to act, without prior authorization from the Land and Natural Resources Division, on behalf of any other department or agency in response to a direct request in writing from an authorized field officer if the department or agency concerned, in the following wildlife cases:

- a. Endangered Species Act of 1973, 16 U.S.C. §1531 et seq.;
- b. Lacey Act, 16 U.S.C. §3371 et seq.;
- c. Airborne Hunting Act, 16 U.S.C. §742(j)(1);
- d. Migratory Bird Treaty Act, 16 U.S.C. §703 et seq.;
- e. Migratory Bird Conservation Act, 16 U.S.C. §§715-715(d), 715(e), 715(f)-715(k), 715(l)-715(r);

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f. Bald and Golden Eagle Protection Act, 16 U.S.C. §§668668(d);

g. Dingell-Johnson Fish Restoration Act, 16 U.S.C. §§777777(i), 777(k);

h. National Wildlife Refuge System Administration Act, 16 U.S.C. §§668dd, 668ee;

i. Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §1431 et seq.;

j. Magnuson Fishery Conservation and Management, Act 16 U.S.C. §1801 et seq.;

k. Whaling Convention Act, 16 U.S.C. §981 et seq.;

l. Atlantic Tunas Convention Act, 16 U.S.C. §971.;

m. Tuna Convention Act, 16 U.S.C. §951 et seq.;

n. Marine Mammal Protection Act, 16 U.S.C. §1361 et seq.;

o. Sockeye Salmon or Pink Salmon Fishing Act, 16 U.S.C. §776 et seq.;

p. Fur Seal Act of 1966, 16 U.S.C. §1151 et seq.;

q. Protection of Sea Otters on the High Seas Act, 16 U.S.C. §1171 et seq.;

r. Wild Free Roaming Horses and Burros Act, 16 U.S.C. §§1331-1340.;

s. Fish and Wildlife Coordination Act, 16 U.S.C. §§661667(e);

t. Animal Damage Control Act, 7 U.S.C. §426 et seq.;

u. Sponge Act, 16 U.S.C. §781 et seq.;

v. Northern Pacific Halibut Act, 16 U.S.C. §772 et seq.; and

w. North Pacific Fisheries Act, 16 U.S.C. §1021 et seq.;

Provided that upon receipt of referrals of any law enforcement action under the above statutes, notice shall be given to the Wildlife and Marine Resources Section before filing or declining to file an action, as set forth in USAM 5-10.312, infra.

Provided that U.S. Attorneys are not authorized to commence actions against foreign vessels or foreign fishermen under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1801 et seq., without prior telephonic approval from the Section. The views of the U.S. Attorney for a district to which a foreign vessel may be brought will be ascertained in advance of seizure by the Coast Guard. The U.S. Attorney should then contact the Section to discuss the complaint to be filed, release bond and inventory arrangements.

5-1.320 Actions Not Subject to Direct Referral to U.S. Attorneys

5-1.321 Prior Authorization Needed to Initiate Action

Except for cases which are authorized to be initiated directly by the U.S. Attorneys, see USAM 5-1.310, supra, actions may not be instituted without the prior authorization of the Assistant Attorney General, who shall sign the complaint prior to its being filed. See USAM 5-1.302, supra. In an emergency, authority to institute an action may be requested by telegraph or telephone. The request should be directed to the Chief of the Section having responsibility for the supervision of the type of litigation involved.

5-1.322 Assignment of Actions Generally

All cases which are not subject to direct referral to the U.S. Attorneys as set forth in USAM 5-1.310, supra, are initially referred to the Assistant Attorney General for review. Such review is assigned to the appropriate Section of the Division which then initially determines whether the case should more appropriately be: (1) assigned to the U.S. Attorney, see USAM 5-1.323, infra, (2) designated as a case to be handled as the joint responsibility of the U.S. Attorney and the Division, see USAM 5-1.324, supra, or, (3) retained by the Division for its direct handling. See USAM 5-1.325, infra. The costs of litigation and the proximity of the U.S. Attorney to the court result in a large percentage of cases being assigned to the U.S. Attorneys. However, the nature of the issue of law involved, the relative national or financial importance of the case, the precedential possibilities of the litigation, and the need for the Division to retain a cadre of staff attorneys trained in the trial of cases, are considerations in making case assignments.

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5-1.323 Cases Assigned to U.S. Attorneys

Assignment of case responsibility to the U.S. Attorney is always with the understanding that the Assistant Attorney General of the Division has supervisory responsibility on behalf of the Attorney General over all litigation under the jurisdiction of the Division. Where possible, the Division will promulgate categories of cases which will be assigned to the U.S. Attorneys; these assignments may distinguish between U.S. Attorneys on the basis of their experience and expertise with respect to such cases. If an assignment of any such case is made pursuant to USAM 5-1.324 or 5-1.325, infra, the notice of assignment to the U.S. Attorney will note the exception.

The U.S. Attorney shall be primarily responsible for all cases assigned to him/her. If he/she feels that he/she cannot accept responsibility by reason of a conflict of interest, the lack of personnel or expertise in his/her office, or other good reasons, he/she should immediately consult with the Chief of the appropriate Section to determine if some other assignment of responsibility can be made.

Regular communication should be maintained with the appropriate Section of the Division regarding the conduct of litigation assigned to the U.S. Attorneys, especially if any problems arise in connection with a case. The Division is organized so as to maintain considerable expertise in the particular subject matter areas under the jurisdiction of the Division and is, therefore, in a position to provide valuable assistance to the U.S. Attorney, including assistance in preparing pleadings and briefs as well as providing general advice on the substantive law and the handling of litigation. A copy of the final order entered in any case must be transmitted promptly to the appropriate Section of the Division.

5-1.324 Cases Assigned as a Joint Responsibility

If the appropriate Section of the Division feels that a given case should be handled as a joint responsibility of the U.S. Attorney and the Division, the Chief of the Section shall make the assignment initially with a written description of the expected division of work and responsibility for the case. In the event the U.S. Attorney involved is not satisfied with the assignment, he/she shall consult with the appropriate Section Chief to resolve the assignment and/or division of responsibility. Any remaining differences will be resolved by the Assistant Attorney General of the Division. At least three months before trial, a firm understanding will be reached between the Division and the U.S. Attorney on trial responsibility.

Either the Division or the U.S. Attorney may request a change in the assignment at any time. The Division will periodically review all joint responsibility assignments with the objective that where Division assistance is no longer required the case may be assigned to the U.S. Attorney under USAM 5-1.323, supra.

5-1.325 Cases for Which the Division is Assigned Responsibility

If the appropriate Section of the Division feels that a given case should be handled by staff attorneys in the Division, the Chief of the Section will notify the U.S. Attorney, and the Chief of the Section and the U.S. Attorney will then agree upon exactly what, if any, support services the U.S. Attorney will provide to assist the staff attorneys in handling the litigation. Again, any differences over such case assignments and the provision of support services will be resolved by the Assistant Attorney General in charge of the Division.

5-1.326 Review and Change of Case Assignments

The assignment of case responsibility to the U.S. Attorney may be reviewed at any subsequent time at the request of the U.S. Attorney, the client agency, or the appropriate Section, and may be changed; a change of assignment will only be made, however, after consultation with the U.S. Attorney. As with all differences between a Section of the Division and the U.S. Attorney, any differences concerning assignment or handling of cases will be resolved by the Assistant Attorney General of the Division.

5-1.327 Case Weighting System

A. Purpose - The purpose of this directive is to implement a system of weighting all new cases in the Division in order to determine more accurately the Division's attorney resource requirements and to ensure a fair workload distribution among attorneys. Ultimately, the case weighting system will be integrated into a computerized docket tracking system.

B. Case Weighting System - The weight of each case will be determined by the number of attorney work days required to complete the case from the time it is opened in a section until it is closed or transferred to another section. The basic unit is one (1) point, which is equivalent to one week (5 days) of attorney time. Fractions of one week should be indicated by applying .2 of a point per work day. For example, a case requiring 12 attorney work days would be assigned a weight of 2.4 points.

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1. The Section Chief is to determine weights by considering what activities are likely to occur throughout the life of a matter, such as preliminary injunction, discovery, factual investigation, legal research, trial, jury trial, actions, travel, etc. The Section Chief should also make a judgment as to whether such things as discovery will be extensive or brief. The weight assigned to a case should reflect the amount of supervisory or reviewing time required, as well as the time required of the primary attorney.

2. Shared and supervised cases should be given two weight numbers, the first for the case, and the second for the Division's role in the case. For example, a supervised case requiring a total of 2 work weeks, but only 3 days of a Division attorney's time would be weighted 6.

3. The case weight should only be changed when something fundamental occurs which will cause a change in time requirements. The weight should not be changed simply because a case has progressed, certain activities have occurred, and there is less work remaining to be done.

4. Case weights are not priorities. However, when weighting a case the Section Chief should consider whether additional time is to be spent on a case because of its high priority.

5. This directive shall be effective immediately with respect to all new cases. Existing cases in all sections should be assigned weights gradually, as time permits. Existing cases in all sections except Land Acquisition should be weighted within a period of one year, so that weights will be available when the computerized docket tracking system is implemented. The Land Acquisition Section's existing caseload should be weighted within two years. Existing cases should be weighted for their entire life span within a Section, past and future, and not simply for their potential future activity.

6. New case weights should be turned in to the Executive Office on a weekly basis, using the form attached hereto. The information will be keypunched for eventual inclusion in the docket tracking system. Case weights should also be noted on each Section's own docket cards.

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SECTION

DATE

CASE WEIGHTS

Case Name and Court	D.J. File No.	Attorneys (s)	Weight

5-1.328 Case Priority System

A. Purpose The purpose of this directive is to implement a case priority system in the Division to ensure that cases are assigned resources appropriate to their level of importance and for other management purposes. This Directive amends L&NRD Directive No. 5-68 with regard to the classification of cases.

B. Case Priority System Four levels of priority are established as follows:

1. "H" (high priority) case. These are the cases deserving the personal attention of the Associate Attorney General, the Deputy Attorney General (in the case of criminal matters), the Assistant Attorney General, or the General Counsel of a department or agency of the United States. Designation and special handling of these cases shall continue under L&NRD Directive No. 7-78. It is anticipated that this will constitute a small number of the Division's cases.

2. Priority 1 case. Cases of the highest importance, meeting the criteria of paragraph D, below.

3. Priority 2 case. Cases of mid-level importance, meeting the criteria of paragraph E, below.

4. Priority 3 case. Cases of low importance, meeting the criteria of paragraph F, below.

C. Procedure

1. Each Section Chief shall assign a priority to each new case as it comes in;

2. Existing cases in all sections should be assigned new priorities within a period of one year (except Land Acquisition which is allowed two years), so that priorities will be available when the Division's computerized docket tracking system is implemented;

3. Cases are assigned priorities by comparing each case against the priority system criteria listed below (and in Division Directive No. 7-78 in the cases of high priority cases). Of the six criteria potentially associated with each case, the highest will determine the priority. For example, a case may rank low in money value, but be absolutely critical to a Presidential Program. It would thus receive a priority 1 designation (or "H" pursuant to Directive No. 7-78) because of its high rank under the program impact criterion; and

4. New case priorities should be added to your case weight form which you are required to submit weekly to the Executive Office under L&NRD Directive No. 15-78. For example, under the column in the form designated "Weight" you may have a case assigned a weight of "2.4." You should also show the priority designation parenthetically on the same form following the weight, such as "2.4(H)" or "2.4(1)." The information will be keypunched for eventual inclusion in the docket tracking system. Case priorities should also be noted on each Section's own docket cards.

D. The criteria for Priority 1 cases are:

1. Geographic Impact of Potential Judgment: regional or national (i.e., greater than statewide);

2. Legal Impact of Potential Judgment: would set a legal precedent of high importance;

3. Potential Impact on Presidential or Client Agency's Program: case is of high importance to program;

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4. Financial Value in Dispute (either best estimate of ultimate judgment or government appraisal, whichever is higher): over \$1 million;

5. Potential Effect on Related Claims: case, not otherwise deserving priority 1, could affect large number of claims, regionally, or nationally; and

6. Court in Which Case is Pending: Supreme (this excludes Briefs in Opposition).

E. The criteria for Priority 2 cases are:

1. Geographic Impact of Potential Judgment: statewide (i.e., greater than a single judicial district);

2. Legal Impact of Potential Judgment: would set a legal precedent of medium importance;

3. Potential Impact on Presidential or Client Agency's Program: case of medium importance to program;

4. Financial Value in Dispute: between \$101,000 and \$1 million;

5. Potential Effect on Related Claims: case, not otherwise deserving priority 2, could affect a large number of claims within a state or judicial district; and

6. Court in Which Case is Pending: not applicable.

F. All cases not designated H, 1 or 2 should be assigned priority 3.

G. In addition to the foregoing, certain other factors may be taken into account in assigning priorities:

1. Criminal enforcement actions should generally be accorded higher priority than civil enforcement actions, all other things being equal;

2. Cases may change in levels of importance as they move from district court to the court of appeals, if the issues appear to be broadening in significance; and

3. Cases which are highly controversial or sensitive should be raised in priority.

H. There is apt to be some confusion during the transition to the new system, especially with regard to Type C cases and to cases assigned to U.S. Attorneys for handling, but in the long run, the new system should prove more efficient than the old.

5-1.329 Identification, Special Handling and Coordination With Client Agencies of High Priority Cases

A. Purpose The purpose of this directive is to set out for Division attorneys procedures for the identification, proper handling and coordination with client agencies of high priority cases; so that client agencies have the maximum opportunity to advise the Division of their priorities, policies, and views, and so that the Assistant Attorney General and the Associate Attorney General are timely notified of significant, highly visible and controversial cases.

B. Identification of High Priority Cases

1. Section Chiefs shall be responsible for the identification of high priority cases in their Sections. High priority cases shall be identified on the basis of an overall review of the factors set forth in Attachment A hereto. It is expected that the designation of high priority cases shall be limited to cases worthy of the time and attention of a General Counsel and of the Assistant Attorney General, and worthy of bringing to the attention of the Associate Attorney General in the Division's weekly reports.

2. In determining whether a case should be assigned the highest priority, Section Chiefs shall be responsible for consulting with the client agency to determine the importance of the case to the agency. The priority accorded a case may be revised from time to time.

3. In addition, Section Chiefs shall meet periodically with their client agencies to discuss ways of improving client consultation.

C. Notification of the Assistant Attorney General of High Priority Cases

1. Section Chiefs shall be responsible for notifying the Assistant Attorney General of high priority cases.

2. Section Chiefs, biweekly, shall submit to the Assistant Attorney General an agenda showing: (1) newly filed high priority cases; (2) pending cases, the priority of which have been revised to high priority status; and (3) pending high priority cases which have had significant activity. The agenda shall indicate the nature of the case, the reason it has been designated high priority, and the status of the case.

3. In addition, Section Chiefs shall be responsible for informing the Assistant Attorney General of pending developments in high priority cases which are of extreme importance, visibility, or sensitivity, and which the Assistant Attorney General may wish to bring to the immediate attention of the Associate Attorney General.

D. Client Coordination on High Priority Cases

1. Section Chiefs shall be responsible for early consultation with client agencies, in all high priority cases. Consultation shall cover the following:

a. The effect of the litigation on the agency's policies and programs;

b. Use of agency attorneys, when appropriate, to assist in the litigation, under the direction of the Section Chief;

c. Positions and arguments to be advanced in the litigation;

d. Settlement or dismissal of the case.

2. In addition, to the maximum extent possible in high priority cases, Section Chiefs shall assure that client agencies are provided with final drafts of all briefs or pleadings concerning the merits of the case, or concerning any other issue which has a potential significant effect on the case, at least 3 days prior to the filing date.

3. If a client agency disagrees with a position or argument advanced in the case, the Section Chief shall consult with the agency to resolve the disagreement. In the event of continued disagreement, the matter shall be referred to the Assistant Attorney General.

E. High Priority Cases Affecting Other Agencies

When a high priority case has a potential significant effect on an agency not a party to the litigation, the Section Chief shall consult with

the Assistant Attorney General to determine the nature and extent of consultation appropriate under the circumstances of the case.

F. Weekly Report to the Associate Attorney General; Monthly Report to the Attorney General

Significant developments in high priority cases shall be included in the weekly report to the Associate Attorney General and the monthly report to the Attorney General.

G. Coordination with Solicitor General's Office and Office of legal Counsel

1. Section Chiefs shall be responsible for assuring that attorneys assigned to high priority cases have familiarized themselves with positions previously taken by the Solicitor General in cases involving the same or similar issues before the Supreme Court. Section Chiefs shall also be responsible for determining whether cases raising the same or similar issues are presently being handled in the Solicitor General's Office, and, if so, the position of the Solicitor General on such issues.

2. Section Chiefs shall consider, with regard to each high priority case, whether or not consultation should take place with the Solicitor General's Office or the Office of Legal Counsel concerning any aspect of the case. In considering the matter, the Section Chief shall consult with the Assistant Attorney General.

H. Division Memoranda to the Solicitor General

Copies of all memoranda to the Solicitor General concerning high priority cases shall be provided to the Associate Attorney General.

ATTACHMENT A

FACTORS TO BE CONSIDERED IN DESIGNATION OF HIGH PRIORITY CASES

A. Whether the case involves the interest of more than one federal agency, or of more than one branch of a federal agency;

B. Whether the case involves an attempt to enjoin the enforcement of an important statute, the implementation of a significant program, or the conduct of federal law enforcement;

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C. Whether the case involves a constitutional challenge to important legislation;

D. Whether the outcome of the case may have a significant effect on government agencies, such as some litigation under NEPA, the Freedom of Information Act, the Privacy Act, etc.;

E. Whether the case involves policies announced or issues publicly addressed by the Administration;

F. Whether the case bears on the interests or activities of Congress;

G. Whether the case involves possible misconduct by members of Congress, judges or high officials in the Executive Branch;

H. Whether the case presents an important or novel conflict between state and federal authority (or between an Indian tribe and state or federal authority); and

I. Whether the case has foreign policy or military ramifications.

5-1.400 [Reserved]

5-1.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-1.510 General

The instructions hereinafter set forth are applicable to all cases under supervision of the Division, whether they be cases directly referred to the U.S. Attorney, cases for which primary responsibility has been assigned to U.S. Attorneys by the Assistant Attorney General, cases which are the joint responsibility of the Division and the U.S. Attorneys or cases which are the primary responsibility of the Division.

5-1.511 Transmittal of Pleadings and Memoranda

Except for such papers as are originally prepared in the Department and then transmitted to the U.S. Attorneys for filing, the U.S. Attorneys should submit to the appropriate Section of the Land and Natural Resources Division in each case involving matters under the jurisdiction of the Section, one copy of the complaint and one copy of all other papers filed by any party or by the court including pleadings, orders, proposed findings, judgments, opinions, briefs, memorandums, offers in compromise, and any other instrument or record.

5-1.512 Stipulations

The U.S. Attorney may stipulate to any fact required to be proved by the government, or to the authenticity of government records. In no case except certain direct referral matters should a U.S. Attorney enter into a stipulation concluding the substantive rights of the United States, or consent to entry of judgment in favor of the adverse party, without specific authority from the Land and Natural Resources Division. Specific authority from the Land and Natural Resources Division to enter into such stipulations, or consent to judgment, is required in all nondirect referral matters and in the following direct referral matters: Direct referral wildlife import, export, Airborne Hunting Act, Bald and Golden Eagle Protection Act, and Wild Horses and Burros Act actions.

5-1.513 Assistance by Other Attorneys

U.S. Attorneys and their Assistants shall themselves conduct and direct all cases within the jurisdiction of this Division handled by them. There is no objection to U.S. Attorneys receiving assistance from attorneys connected with other offices of the government in the preparation and trial of cases, but it should be understood that such attorneys assist only, and do not conduct, direct, or control cases in which they may be interested. 28 U.S.C. §§509, 516 and 547. Such trial attorneys are only "of counsel" to the U.S. Attorney; they do not control or direct the conduct of cases in which they are interested, and they may not sign pleadings or briefs on behalf of the government or its officers, employees, or agents.

5-1.520 Suits Against the United States, Federal Agencies or Officials

5-1.521 Appearances by U.S. Attorneys

Upon being served with the complaint designating the United States or a federal official or agency as a defendant, a U.S. Attorney shall immediately take such steps as are necessary to protect the federal interest, and shall immediately transmit copies of the complaint and other papers to the supervisory section of the Land and Natural Resources Division. However, when time permits, no appearance should be made until instructions from the Department are obtained. If necessary, the request for instruction should be only by telephone or telegraph, directed to the Chief of the Section having jurisdiction over the type of action involved.

5-1.522 Removal of State Court Actions

An action against the United States, a federal agency, or a federal official, brought in a state court, may be removed to a federal court (28 U.S.C. §1442). The U.S. Attorney should seek instructions immediately as to whether an action in a state court should be removed to a federal court, and before receiving instructions, he/she should take no steps in the state court which would prevent removal.

5-1.523 Sovereign Immunity Not Waivable

Neither the Department of Justice nor any U.S. Attorney may consent to suits against the United States, its officers or agents. A recent statute having some effect upon the doctrine of sovereign immunity is the Act of October 21, 1976, P.L. No. 94-574.

5-1.524 Service of Process on the Attorney General

The Attorney General has designated the Deputy Attorney General and the Administrative Assistant to the Attorney General to accept service of pleadings and process for him/her. In the absence of specific authority from the Attorney General or his/her designees, U.S. Attorneys have no authority to accept such service.

5-1.525 Counterclaims

In suits against federal agencies, or federal employees acting in their official capacity, counterclaims shall not be filed in the name of the defendants. If a basis for a counterclaim exists in such a suit, a separate action may be filed in the name of the United States, but such action may be filed only with the prior approval of the Assistant Attorney General.

5-1.530-50 [Reserved]

5-1.560 Proposed Findings of Fact and Conclusions of Law

In all actions in the federal courts tried upon the merits without a jury, care should be taken to have proper findings of fact and conclusions of law entered by the court as provided by Rule 52(a), Federal Rules of Criminal Procedure. When possible, two copies of the requests for findings should be transmitted to the Land and Natural Resources Division for comment and discussion before filing.

5-1.570 Costs

In no case may payment of costs be waived. Whenever money is accepted as full or partial payment, or in compromise, it must be applied first to court costs.

5-1.580 Judgments

5-1.581 Recording Judgments

Whenever a judgment is obtained by the United States affecting title to its property, the necessary recordation should be made promptly in accordance with the requirements of local law and the provisions of 28 U.S.C. §1962 et seq.

5-1.582 Perfecting Lien of Judgments

Whenever a judgment for money is recovered by the United States, the necessary action shall be taken in accordance with the provisions of local law to perfect and preserve the lien of the judgment upon all property of the judgment debtor in the district in which the judgment has been entered or in any other district where the property of the defendant may be found. See 28 U.S.C. §§1962 and 1963, and also Rhea v. Smith, 274 U.S. 434 (1927).

5-1.583 Collection Of Claims or Judgments

Except when required by the circumstances of a particular case, no property other than money should be accepted in full or part payment of a claim, compromise, or judgment and in no event shall property other than money be accepted until all incurred court costs are paid. The procedure followed in the collection and transmittal of funds is set forth in the title to this Manual relating to the Administrative Division.

5-1.584 Execution to Enforce Collection of Judgments

Whenever necessary to enforce collection of a money judgment, the U.S. Attorney or the field attorney should ascertain such facts as the facilities of his/her office will permit to determine whether the judgment debtor has property subject to execution and whenever necessary should invoke the aid of the field officer of the agency at whose instance the action originally was instituted. If property subject to execution is found, execution should be issued and a levy made. If no property subject to execution is

found, execution should not be issued unless required by local law to perfect or protect the judgment lien or its priority, or unless the U.S. Attorney has reason to believe the issuance of execution will induce voluntary payment. If no distrainable property is found, the Department should be informed of the results of the investigation and the case should be held in abeyance until a determination can be made as to what further action should be taken.

5-1.585 Execution to Enforce Judgments for Possession

A judgment for possession of property owned by the United States should be served upon all defendant trespassers, including those in privity with such defendants. If they fail to vacate the property in accordance with the judgment, a writ of assistance should be obtained from the clerk of the court and delivered to the U.S. Marshal for execution. When justified by unusual circumstances, an injunction may be obtained against the unlawful occupants. If they refuse to vacate the premises as required by the injunction, contempt proceedings may be instituted. Service of the injunction upon each respondent is a prerequisite to the institution of contempt proceedings.

5-1.586 Post-Judgment Collection Efforts

The instructions issued by the Civil Division governing action to be taken for the collection of judgments, set forth in USAM 3-8.200 are applicable to all judgments entered in favor of the United States, and reference is made to them for appropriate guidelines to be followed in collection activities to be undertaken after the entry of judgment in favor of the United States in Land and Natural Resources Division cases. This does not enlarge the authority of cases beyond the limits stated in USAM 5-1.630, infra.

5-1.590 Appeals

5-1.591 Copies of Decisions to be Forwarded to Supervising Section

In cases subject to the supervision of the Land and Natural Resources Division in which a decision is rendered, the U.S. Attorney shall, by the most expeditious means, forward a copy of the decision to the Chief of the Section involved.

5-1.592 Recommendation With Respect to Appeal

In any case handled by a U.S. Attorney in which a final decision is rendered, the U.S. Attorney shall proceed in accordance with the provisions of USAM 2-2.000.

5-1.600 SETTLEMENT AND DISMISSAL OF CASES

5-1.610 Settlement Authority of the Assistant Attorney General

The authority delegated by the Attorney General to the Assistant Attorney General to compromise suits is set forth in 28 C.F.R. §§0.016 through 0.172. As in hereinafter set forth, the Assistant Attorney General has redelegated to Section Chiefs, and to the U.S. Attorneys, authority to compromise, close, or dismiss, certain types of cases. Except for those claims expressly and specifically authorized to be compromised, closed or dismissed by the U.S. Attorneys, no claim or case within the area of responsibility of the Land and Natural Resources Division may be compromised, closed or dismissed without the specific authority of the Attorney General, the Assistant Attorney General or the appropriate Section Chief. Instruction with respect to submitting proposed settlements or compromises for approval, and for authorization to dismiss cases, are set forth in USAM 5-2.600, *infra*, for cases under the supervision of the Land Acquisition Section; USAM 5-4.600, *infra*, for cases under the supervision of the Indian Resources Section; USAM 5-5.600, *infra*, for cases under the supervision of the Marine Resources Section; and USAM 5-6.600, *infra*, for cases under the supervision of the General Litigation Section.

5-1.620 Settlement Authority of Officers Within the Land and Natural Resources Division

Certain authority of the Assistant Attorney General to compromise claims has been delegated to the Deputy Assistant Attorney General and the Chiefs of the various litigating sections. The most recent such delegation of authority was effected on October 29, 1976, by Land and Natural Resources Directive No. 7-76. That directive as amended reads as follows:

Section II - AUTHORITY TO COMPROMISE, DISMISS, OR CLOSE CASES

A. Delegation to Deputy Assistant Attorney General

Subject to the limitations imposed by Paragraph D of USAM 5-1.640, *infra*, the Deputy Assistant Attorney

General in the Land and Natural Resources Division is hereby authorized, with respect to matters assigned to the Land and Natural Resources Division, to accept or reject offers in compromise of claims against the United States in which the amount of the proposed settlement does not exceed \$500,000, and of claims in behalf of the United States in which the gross amount of the original claims does not exceed \$500,000.

B. Delegation to Section Chiefs

Subject to the limitations imposed by Paragraph D of USAM 5-1.640, *infra*, the Chiefs of the litigating sections of the Land and Natural Resources Division are hereby authorized, with respect to matters assigned to their respective sections, to accept or reject offers in compromise of claims against the United States in which the amount of the proposed settlement does not exceed \$300,000, and of the claims in behalf of the United States in which the gross amount of the original claim does not exceed \$300,000.

5-1.630 Settlement and Dismissal Authority of U. S. Attorneys

Land and Natural Resources Division Directive No. 7-76 (41 Fed. Reg. 53660), as amended authorizes U.S. Attorneys to compromise, close or dismiss certain cases. Pertinent portions of the Directive, as amended are as follows:

C. Delegations to United States Attorneys

1. Compromise of Land Cases. Subject to the limitations imposed by paragraph D of USAM 5-1.642, *infra*, U.S. Attorneys are authorized, without the prior approval of the Land and Natural Resources Division, to accept or reject offers in compromise in the direct referral land cases listed in subparagraph A-1 of section I, and in claims against the United States in which the amount of the proposed settlement does not exceed \$200,000, if the authorized field officer of the interested agency concurs in writing, except that where the United States is a plaintiff, a U.S. Attorney may accept an offer without the concurrence of the field officer if the acceptance is based solely upon the financial circumstances of the debtor.

2. Compromise of Environmental Cases. Prior delegations of authority to the United States Attorneys to settle any type of case in which the Department of Justice represents the Environmental Protection Agency, or the Administrator or any other official of that Agency, are hereby revoked; all offers in compromise of such cases shall be submitted to the Assistant Attorney General of the Land and Natural Resources Division for appropriate action.

3. Compromise of Wildlife Cases. Subject to the limitations imposed by this paragraph and section USAM 5-1.640, *infra*, United States Attorneys are authorized, without prior approval of the Land and Natural Resources Division, to settle all direct referral actions relating to wildlife law enforcement. This delegation of authority to the U.S. Attorneys to settle wildlife import, export, Airborne Hunting Act, Bald and Golden Eagle Protection Act, and Wild Horses and Burros Act actions.

4. Compromise of Condemnation Cases.

a. Subject to the limitations imposed in Paragraph D of USAM 5-1.620, *supra*, U.S. Attorneys are hereby authorized, without prior approval of the Land and Natural Resources Division, to accept or reject offers in compromise of claims against the United States for just compensation in condemnation proceedings in any case in which the gross amount of the proposed settlement does not exceed \$200,000.

b. When a U.S. Attorney has settled a condemnation proceeding under the authority conferred upon him by the foregoing subparagraph he shall promptly secure the entry of judgment and distribution of the award, and shall take all other steps necessary to dispose of the matter completely. The U.S. Attorney concerned shall also immediately forward to the Department a report, in the form of a letter or memorandum, bearing his signature or showing his/her personal approval, stating the action taken and containing an adequate statement of the reasons therefor. In routine cases, a form, containing the minimum elements of the required report, may be used in lieu of a letter or a memorandum. In any

case, special care shall be taken to see that the report contains a statement as to what the valuation testimony of the United States would have been if the case had been tried.

5. Closing or Dismissal of Matters and Cases. Subject to the limitations imposed in Paragraph D of USAM 5-1.640, infra, a direct referral matter described in Section I may be closed without action by the U.S. Attorney or, if in court, may be dismissed by him if the field officer of the interested agency concurs in writing that it is without merit legally or factually. Except for claims on behalf of Indian or Indian tribes, the U.S. Attorney may close a claim without consulting the field office of the interested agency if he concludes (a) that the cost of collection under the circumstances would exceed the amount of the claim is uncollectible; claims on behalf of Indian individuals or Indian tribes may not be closed merely because the cost of collection might exceed the amount the claim.

5-1.640 Limitations on Delegations

The authority to compromise, close or dismiss cases delegated in USAM 5-1.620 and 5-1.630, supra, may not be exercised when:

A. For any reason, the compromise of a particular claim, as a practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated above;

B. Because a novel question of law or a question of policy is presented, or for any other reason, the offer should, in the opinion of the officer or employee concerned, receive the personal attention of the Assistant Attorney General in charge of the Land and Natural Resources Division; and

C. The agency or agencies involved are opposed to the proposed closing or dismissal of a case, or acceptance or rejection of the offer in compromise.

If any of the above conditions exist, then the matter shall be submitted for resolution to the Assistant Attorney General in charge of the Land and Natural Resources Division.

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5-2.000 THE ENVIRONMENTAL DEFENSE SECTION

5-2.001 Establishment

The Environmental Defense Section was created on July 1, 1981, as part of a Division reorganization. The predecessor section, the Pollution Control Section, was abolished on that date.

5-2.100 AREA OF RESPONSIBILITY

5-2.110 General Responsibilities

The Environmental Defense Section defends, and supports and coordinates the defense of, all civil and criminal cases, matters and proceedings arising under the statutes enumerated in USAM 5-2.130, infra (all of which statutes are concerned with the regulation and abatement of sources of pollution or with the protection of the natural environment). In cooperation with the Environmental Enforcement Section, it prosecutes, and supports the prosecution of, civil and criminal matters arising under Section 10 of the River and Harbor Act of 1899 and Sections 301 and 404 of the Clean Water Act. The Section also engages in certain other affirmative litigation.

5-2.111 Defense of Actions Directed Against the United States, Its Agencies and Officials

The Environmental Defense Section has Departmental responsibility for defending actions brought against the Administrator of the Environmental Protection Agency, and his or her subordinate officials, and against the Secretary of the Army, the Chief of Engineers of the United States Army, and their subordinate officials, challenging administrative actions which those officials have taken or failed to take under the statutes set forth in USAM 5-2.130, infra. Such actions may take the form of (a) challenges to regulations promulgated by these officials, (b) challenges to the propriety of the issuance or denial of permits, (c) assertions that actions required by law have not been taken, (d) challenges to measures taken or not taken with regard to enforcement of the statutes listed in USAM 5-2.130, infra and (e) any other defensive matters relating to the agencies' activities under the statutes listed in USAM 5-2.130, infra.

Additionally, the Environmental Defense Section has Departmental responsibility for litigation directed against any other federal agency or official alleged to have violated any duties under the statutes listed in

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USAM 5-2.130, infra and also for litigation directed at federal installations, properties, and activities charged with violating applicable discharge or emissions limitations, or other federal, state or local pollution laws.

5-2.112 Cases Brought on Behalf of the United States

The Environmental Defense Section also has responsibility for civil and criminal actions initiated on behalf of the United States to enforce the provisions of Section 10 of the River and Harbor Act of 1899 and Sections 301 and 404 of the Clean Water Act, relating to unlawful filling or other unauthorized activities undertaken in waters of the United States. As a matter of policy and practice, these civil and criminal prosecutions are initiated only at the request of the Administrator of the Environmental Protection Agency or Chief of Engineers of the United States Army.

Whenever apparent violations of the above-mentioned statutes are brought to the attention of the Department of Justice by persons or agencies other than those with statutory enforcement responsibilities, the Department forwards reports of these apparent violations to cognizant enforcement officials for evaluation and referral for legal proceedings, if appropriate.

Forwarding reports of suspected violations to the appropriate agencies affords them an opportunity to resolve matters administratively. It also minimizes the government's vulnerability to a number of technical, procedural and equitable defenses. On occasion, however, an action under Section 10 or Section 13 of the River and Harbor Act may be initiated by the Environmental Defense or Enforcement Section of U.S. Attorneys at their own instance. All such actions require the approval of the Assistant Attorney General, Land and Natural Resources Division.

Other affirmative litigation undertaken on behalf of the agencies responsible for administering the statutes listed in USAM 5-2.130, infra and on behalf of agency clients having facilities subject to federal, state and local pollution control laws are initiated upon referral of the proposed action by the client agency to the Section Chief, Environmental Defense Section.

5-2.120 Overlapping Section Case Responsibility

While the Environmental Defense Sections responsible for defensive actions involving the statutes listed in USAM 5-2.130, infra cases arise from time to time involving several different claims and defenses, only some of which lie within the cognizance of the Environmental Defense Section. The Chiefs of the appropriate Sections within the Land and Natural Resources

Division will decide between or among themselves concerning the primary assignment of such cases within the Division. The Section having primary responsibility for the case also has the responsibility to coordinate with the appropriate Section within the Division on all matters within said Section's jurisdiction. This should be accomplished by furnishing copies of pertinent pleadings and memoranda to said Section. Whenever possible, the Division attorney with the primary responsibility for the case will notify the U.S. Attorney of the identity of the attorney in any other Section who may be contacted with respect to matters within the expertise of that Section.

5-2.121 Responsibility for Cases With New Issues or an Altered Character

Occasionally, issues involving statutes within the Environmental Defense Section's cognizance may be injected into existing litigation by way of amendment or supplemental pleadings, etc. In such events, U.S. Attorneys should notify the Chief of the Environmental Defense Section so that the Section can properly perform its responsibilities.

On rare occasions, the fundamental character of existing litigation may change such that issues within the cognizance of the Environmental Defense Section become the dominant issues. In such situations, the Environmental Defense Section staff attorney with advisory responsibility for the case shall notify the Section Chief who may request a transfer of Section responsibility if he deems it appropriate. If such issues become dominant in a case where the U.S. Attorney has primary responsibility, he may make a written request to the Assistant Attorney General, Land and Natural Resources Division, to have the case transferred to the Environmental Defense Section.

On occasion private plaintiffs may assert federal common law nuisance claims as a basis for relief against the United States, its agencies and officers. Any such case should immediately be brought to the attention of the Chief, Environmental Defense Section.

5-2.130 Statutes Administered

The Environmental Defense Section is responsible for conducting defensive and certain other litigation as described in USAM 5-2.110, 5-2.111 and 5-2.112, supra arising under the following statutes:

A. Sections 10 and 13 of the River and Harbor Act of 1899, 33 U.S.C. §§403, 407;

B. The Clean Water Act (Federal Water Pollution Control Act, as amended), 33 U.S.C. §1251 et seq. (except for in rem actions against

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vessels, which are supervised by the Admiralty and Shipping Section of the Civil Division);

C. The Toxic Substances Control Act of 1976, 15 U.S.C. §2601 et seq.;

D. The Safe Drinking Water Act of 1974, 42 U.S.C. §300f et seq.;

E. The Clean Air Act, 42 U.S.C. §7401 et seq.;

F. The Noise Control Act of 1972, 42 U.S.C. §4901 et seq.;

G. The Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §7133 et seq.;

H. The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136 et seq.;

I. The Resource, Conservation and Recovery Act, 42 U.S.C. §6901 et seq. (also called the "Solid Waste Act");

J. The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq. (also called "Superfund" act);

K. Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §1401 et seq. ("Ocean Dumping Act").

5-2.200 ORGANIZATION

5-2.210 General

The Section is administered by a Chief and an Assistant Chief. The work of the Section is assigned among staff attorneys according to experience and workload. Generally speaking, all staff attorneys are involved to some extent with every aspect of the Section's work, and there are no specific units or other organizational subdivisions. General information relating to the Section or cases within its supervision may be obtained by calling the Chief or Assistant Chief at (202) 633-2219. Information on a specific case should be requested from the staff attorney assigned to that case. Where the staff attorney's name is unknown, the docket clerk of the Section (202) 633-5251 will furnish that information.

5-2.220 General Duties of Staff Attorneys

In general, the following are the more significant duties of staff attorneys assigned to the Environmental Defense Section; (a) to handle cases authorized by statutes for direct review in appellate court; (b) to handle environmental litigation in district courts in cases of major significance when directed by the Assistant Attorney General, Land and Natural Resources Division, pursuant to the policies set forth in USAM 5-2.300 et seq., infra; (c) to offer advice, policy guidance and trial assistance in environmental cases in the district court where the U.S. Attorney or designated assistant has primary responsibility for the litigation; and (e) to assume advisory responsibility with respect to environmental issues in cases falling within the cognizance of other Sections of the Land and Natural Resources Division.

5-2.300 SUPERVISION AND HANDLING OF ENVIRONMENTAL DEFENSE SECTION CASES

5-2.301 Requests for Instructions

All requests for instructions and guidance relating to the defense or prosecution of actions under the jurisdiction of the Environmental Defense Section shall be referred to the Chief of the Environmental Defense Section of the Land and Natural Resources Division of the Department of Justice, Washington, D.C. 20530 (202) 633-2219.

5-2.302 Assignment of Case Responsibility

Responsibility for the handling of cases under the supervision of the Environmental Defense Section is assigned by the Chief of the Section under the provisions of USAM 5-1.323 through 5-1.325, supra.

5-2.310 Authority of U.S. Attorneys to Initiate Actions Without Prior Authorization, i.e., Direct Referral Cases

At present, the Assistant Attorney General, Land and Natural Resources Division, has delegated to the U.S. Attorneys the authority to act, without prior authorization from the Land and Natural Resources Division, on behalf of any other department or agency in response to a direct request in writing from an authorized field officer of the department or agency concerned, in the following environmental cases under the supervision of the Environmental Defense Section and Enforcement Section in certain cases:

Civil or criminal enforcement actions involving the dredging or filling or alteration of the navigable water of the United States and their

tributaries in violation of Section 10 of the River Harbor Act of March 13, 1899 (33 U.S.C. §403), and in violation of Sections 301 and 404 of the Clean Water Act, 33 U.S.C. §§1311, 1344. This authority is, however, revocable on a case by case basis where, in the opinion of the Assistant Attorney General, important or novel issues of law or policy are involved.

Generally speaking, direct referral cases are of a routine nature and involve statutes whose interpretation is relatively well-settled. Departmental policies on cases authorized for direct referral, however, are not necessarily related to policies on case responsibility allocation. The former have been formulated in cooperation with enforcement agencies to afford them an opportunity for headquarters review of enforcement action falling within unsettled areas of the law.

5-2.311 Notification to Environmental Defense Section of Intention to File Actions

Prior to filing a civil complaint or criminal information or return of indictments in a case authorized for direct referral, the Chief, Environmental Defense Section, shall be notified of the proposed action, and shall be furnished with a copy of the written request from the authorized field officer for initiation of the action.

5-2.312 Transmittal of Papers to Environmental Defense Section and Client Agencies

One copy of each letter prepared or received by a U.S. Attorney in a direct referral case, as well as one copy of each pleading and paper filed by any party or by the court, shall be promptly forwarded to the Environmental Defense Section, and two copies shall be forwarded to the local officer of the referring agency (the local officer forwards one copy to his agency in Washington, D.C.).

5-2.313 Authority to Handle Direct Referral Cases Does Not Extend to Appeals

The authorization to handle direct referral cases under the provisions of USAM 5-2.310, supra extends to district court proceedings only. Responsibility for appellate proceedings in all such cases remains in the Division's Appellate Section. See USAM 5-8.310 et seq., infra. Accordingly, appeals in all such cases are governed by the procedures in USAM Title 2, Appeals.

5-2.320 Actions Not Subject to Direct Referral to U.S. Attorneys

5-2.321 Prior Authorization Needed to Institute Action

Except for cases not requiring prior authorization as stated in USAM 5-2.310, supra no case under the supervision of the Environmental Defense Section may be initiated by a U.S. Attorney without the prior authorization of the Assistant Attorney General, who shall sign the complaint prior to its being filed (see USAM 5-1.302, supra). Additionally, U.S. Attorneys may not initiate upon direct referral cases arising under the statues listed in USAM 5-2.310, supra where relief sought is monetary damages or civil penalties in excess of the U.S. Attorneys' settlement authority.

No defensive matters may be handled by the U.S. Attorneys on direct referral.

In cases under the supervision of this Section not authorized for direct referral, in which the U.S. Attorney wishes to file an action in the name of the United States, a request for such authority shall be sent to the Assistant Attorney General, Land and Natural Resources Division, attention Chief, Environmental Defense Section. Responsibility for handling such cases will be determined in accordance with the policies set forth in USAM 5-1.322 through 5-1.325, supra.

5-2.400 [Reserved]

5-2.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-2.510 General

The general instructions set forth in USAM 5-1.500 et seq., infra with respect to the handling of litigation under the jurisdiction of the Land and Natural Resources Division apply litigation within the cognizance of the Environmental Defense Section.

Particular attention should be given to litigation which is, or should be, brought in the court of appeals in the first instance and, therefore, which is handled exclusively by staff attorneys from the Environmental Defense Section. Another class of cases requiring careful attention and timely response is actions for injunctive relief against federal officials. More detailed guidance on this latter category of cases can be found in USAM 5-2.530 et seq., infra.

5-2.520 Preparing Responsive Pleadings in Actions Directed Against the United States, Its Agencies or Officials

Whenever an action is initiated against an agency or official of the United States, the underlying factual material required for the preparation of responsive pleadings is forwarded from the headquarters of the concerned agency to the Assistant Attorney General, Land and Natural Resources Division, by way of a litigation report. Except in unusual circumstances, agencies are required to forward a litigation report well in advance of the sixty (60) day deadline for responsive pleadings specified by Rule 12(a). If the U.S. Attorney has been given primary litigation responsibility, the Environmental Defense Section will request the agency to forward a copy of the litigation report to the U.S. Attorney concurrently with its transmittal to the Assistant Attorney General.

There are, however, inherent delays in the customary procedure for transmitting litigation reports. Service of the complaint may be upon the agency headquarters in Washington, D.C., and it may be some time before the local agency field office is aware of the pendency of the action. To minimize potential delays, the U.S. Attorney should immediately advise local agency field offices and the Chief, Environmental Defense Section, of the pendency of actions in which they may be a party or otherwise have an interest. The field offices should be provided with copies of the complaint and related documents as soon as possible so that they can initiate the preparation of a litigation report.

5-2.520(a) Temporary Restraining Orders and Preliminary Injunctions

Occasionally, an action directed against an agency or official of the United States will involve a motion for temporary restraining order or preliminary injunction or otherwise require that action be taken on behalf of the United States well before any responsive pleadings are due. In such cases the U.S. Attorney should immediately notify the Chief of the Environmental Defense Section (Telephone FTS 633-2219). If memoranda, affidavits or other responses must be filed prior to the agency's preparation of a litigation report, the U.S. Attorney should clear all legal and factual positions with the Environmental Defense Section prior to advancing them formally on behalf of the United States. It is the responsibility of the Environmental Defense Section to coordinate such positions with the agency headquarters in Washington, D.C.

5-2.521 Lis Pendens and the Recording of Judgments

In civil prosecutions under Sections 10 and 13 of the River and Harbor Act and Section 301 and 404 of the Clean Water Act seeking prohibitory or mandatory injunctive relief, complications may arise if the ownership of the property in question changes hands during the pendency of the action. Where

there is a threat of transfer or ownership, the U.S. Attorney should consider filing a notice of the pendency of the action, or *lis pendens*. The steps necessary for the filing of such a notice are determined by the law of the particular state (see 28 U.S.C. §1964).

On occasions, the final judgment in a civil prosecution under these statutes may, in effect, place a permanent burden on the property which was subject to the unauthorized activities. In order to protect the future interests of the United States, the judgment should be recorded in accordance with the requirements of local law and the provisions of 28 U.S.C. §1962 et seq.

5-2.522 Discovery

One of the primary advantages of civil, as opposed to criminal, pollution control prosecutions is the availability of extensive discovery under the Federal Rules of Civil Procedure. A thorough discovery can result in substantial narrowing of the issues and frequently compel favorable settlements. The Environmental Defense Section maintains files of discovery documents which have been employed successfully in past cases. Upon request to the staff attorney, U.S. Attorneys may obtain pertinent sample interrogatories, requests for admissions, etc., or other assistance in preparing discovery for a particular case.

5-2.523 Trial Assistance

U.S. Attorneys are encouraged to request assistance in trial preparation from the staff attorney assigned to a case. Section staff attorneys are often in a position to obtain legislative histories, archive materials and technical information which is not available in U.S. Attorneys' offices. Memoranda, trial briefs and information on unreported cases with respect to contested issues of law can also be obtained from the staff attorneys. The Section is able to obtain the services of expert witnesses through the headquarters of a number of different agencies in Washington, D.C.

To the extent possible, the Environmental Defense Section will also make experienced staff attorneys available for assistance during the trial of cases delegated to the U.S. Attorney's Office and within the Section's cognizance. Requests for such assistance should be directed to the Chief of the Environmental Defense Section.

5-2.530 Suits Against the United States, Federal Agencies or Officials

5-2.531 General

Upon notification that an action has been initiated against the United States, its agencies or officials, the U.S. Attorney should examine the complaint and supporting documents to ascertain whether the action will involve issues within the cognizance of the Environmental Defense Section. If it appears that the Environmental Defense Section will have responsibility for the case (see USAM 5-2.112, *supra*), the U.S. Attorney should promptly send a copy of the complaint and supporting documents to the Chief of the Environmental Defense Section.

If the case does not appear to be the primary responsibility of the Environmental Defense Section but appears that the Section may have advisory responsibilities, the Section Chief should be notified pursuant to USAM 5-2.120, *supra*.

5-2.532 Direct Review in the Courts of Appeals

Most of the statutes listed in USAM 5-2.130, *supra* authorize direct review in the appellate courts of various actions taken by the Administrator of the Environmental Protection Agency, as well as certain other federal officials; all cases involving such petitions for review in such cases which may be served upon a U.S. Attorney should be promptly forwarded to the Chief of the Environmental Defense Section.

5-2.533 Citizens' Suits

The Clean Air Act, the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, the Noise Control Act, and several of the other Acts also authorize citizen suits in the United States district courts against various persons, including federal officials. Normally, a period of notice is required before such an action may be instituted. Citizens' suits must be analyzed carefully to determine the relief sought in the case, and the U.S. Attorney should promptly seek instructions from the Chief, Environmental Defense Section, as to the handling of the case.

5-2.534 Suits Against the Secretary of the Army and Subordinate Officials
Under the River and Harbor Act of 1899

Administrative actions of the Secretary of the Army and subordinates taken under Section 10 or 13 of the River and Harbor Act are subject to judicial review only on the basis of the administrative record and under the

arbitrary and capricious standard. Trial de novo should be resisted. See Divosta Rentals v. Lee, 488 F.2d 674 (5th Cir. 1973); Bankers Life and Casualty v. Resor, 469 F.2d 994 (5th Cir. 1972). Immediately upon receipt of any such lawsuit, the U.S. Attorney should contact the Chief, Environmental Defense Section, for instructions as to the handling of the matter.

5-2.600 SETTLEMENT AND DISMISSAL OF CASES

5-2.610 General

U.S. Attorneys are not authorized to settle or dismiss any case arising under any of the statutes listed in USAM 5-2.130, supra. Any offer to settle or dismiss any such suit must be directed to the Chief of the Environmental Defense Section, who will take final action, or if the matter is not within the scope of his/her the delegated authority, will forward the offer, with his/her own recommendation, to the Deputy Assistant Attorney General, who, in turn, will either act upon the offer, or, if necessary, refer the matter to the Assistant Attorney General. Offers to settle or compromise in direct referral cases, when transmitted to the Environmental Defense Section, should be accompanied by the recommendation of the referring agency.

5-2.611 Transmittal of Settlement Offers

Any offer to settle or dismiss an action shall be transmitted to the Chief of the Environmental Defense Section for referral to the Assistant Attorney General and for such other action as may be directed by regulation. Such offers should be accompanied by the written comments and recommendation of the referring agency. In emergency situations, such as with settlement offers received during trial, settlement offers dealing exclusively with monetary damages or penalties may be communicated to the Chief of the Environmental Defense Section by telephone.

5-2.612 Solicitation of Agency Views

Whenever feasible, U.S. Attorneys should hold continuing discussions with the referring agency prior to and during settlement negotiations. This will ensure that the proposals being discussed are compatible with agency policies and regulations and will facilitate agency approval.

Additionally, agencies other than the referring agency may have statutory review responsibilities in connection with work in navigable waters --for example, the U.S. Fish and Wildlife Service has the responsibility to

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review, comment on, and make recommendations as to such work under the Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§661-6660. In the interests of inter-agency cooperation, the views of these agencies should be included among the documents transmitted to the Chief of the Environmental Defense Section.

5-2.613 Dismissal of Criminal Cases

The Chief of the Environmental Defense Section has been delegated the authority to approve dismissals of indictments or information in criminal cases under the supervision of the Environmental Defense Section. No such criminal action may be dismissed by a U.S. Attorney unless approval from the Chief of the Environmental Defense Section has been first obtained.

1984 USAM (superseded)

5-3.000 ENVIRONMENTAL ENFORCEMENT SECTION

5-3.001 Establishment

The Environmental Enforcement Section was created on September 10, 1980, by Land and Natural Resources Division Directive No. 17-80. Its functions were merged with and subsumed those of the Hazardous Waste Section in July of 1981.

5-3.002 Purpose and Functions

The Environmental Enforcement Section was organized in order to provide a specialized legal staff capable of carrying out the effective enforcement of laws relating to protection of the environment. The duties of section attorneys with regard to cases arising under the statutes identified in USAM 5-3.102, infra, include the following:

A. Conduct of all phases of either civil or criminal litigation at the direction of the Assistant Attorney General, Land and Natural Resources Division, in all cases in which section attorneys have lead responsibility;

B. Cooperation with U.S. Attorneys in the conduct of all phases of civil or criminal litigation in all cases in which the U.S. Attorneys have lead responsibility and in which section attorneys are directly involved in the litigation;

C. Assistance, advice, and policy guidance to U.S. Attorneys in support of civil or criminal prosecutions, whether or not section attorneys are directly involved in such litigation; and

D. Processing complaints and settlement proposals which require the approval of the Assistant Attorney General of the Land and Natural Resources Division.

5-3.100 AREA OF RESPONSIBILITY

5-3.101 Civil and Criminal Matters

The Section also has responsibility for civil and criminal cases under the statutes identified in USAM 5-3.102, infra. The Section includes a group of attorneys who specialize in criminal enforcement matters, and provisions of this chapter which relate exclusively to criminal enforcement

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are contained in USAM 5-3.700 et seq., infra.

5-3.102 Statutes Administered

The Environmental Enforcement Section is responsible for conducting civil and criminal enforcement litigation arising under the following statutes:

A. Federal Water Pollution Control Act or Clean Water Act, 33 U.S.C. §1251 et seq. (except for in rem actions against vessels, which are supervised by the Torts Branch (Admiralty and Shipping) of the Civil Division and except for wetlands cases under 33 U.S.C. §1344 that are supervised by the Environmental Defense Section);

B. Clean Air Act, 42 U.S.C. §7401 et seq.;

C. Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq. (also known as the Solid Waste Disposal Act);

D. Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. §9601 et seq.;

E. Safe Drinking Water Act, 42 U.S.C. §300(f) et seq.;

F. Toxic Substances Control Act, 15 U.S.C. §2601 et seq.;

G. Federal Insecticide, Fungicide and Rodenticide Act, U.S.C. §135(d) et seq.;

H. River and Harbor Act, 33 U.S.C. §4401 et seq., except for in rem actions against vessels and wetlands cases. See Federal Water Pollution Control Act, supra;

I. Marine Protection Research and Sanctuaries Act, 33 U.S.C. §1401 et seq.;

J. Noise Control Act, 42 U.S.C. §4901 et seq.;

K. The Atomic Energy Act of 1954, 42 U.S.C. §2011 et seq., insofar as it relates to the prosecution of violations committed by a company in matters involving the licensing and operation of nuclear power plants and affecting the environment;

L. Powerplant and Industrial Fuel Use Act of 1978 (P.L. 95-620), National Energy Conservation Policy Act (P.L. 95-619), and Titles I and V

of the Public Utility Regulatory Policies Act of 1978 (P.L. 95-617);

M. Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §7133 et seq.;

N. Section 2 of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §791 et seq.;

O. The Act of June 23, 1910 (33 U.S.C. §421 et seq.);

P. The Act of June 29, 1888 (33 U.S.C. §441 et seq.);

Q. Sections 3, 6, and 9 of the Act of August 30, 1961 (33 U.S.C. §§1002, 1005, 1008);

R. Sections 15 and 18 of the Deepwater Port Act of 1971 (33 U.S.C. §1501 et seq.), insofar as a violation of the Act or the rules and regulations promulgated pursuant thereto results in environmental pollution;

S. Section 5(a)(2) of the Outer Continental Shelf Lands Act of August 7, 1953 (43 U.S.C. §1334(a)(2)), where the violation of a rule or regulation results in environmental pollution.

5-3.110 General Responsibilities

The Environmental Enforcement Section prosecutes, supports, and coordinates the prosecution of all civil and criminal enforcement cases, matters, and proceedings arising under the statutes identified in USAM 5-3.102, supra, or initiated under federal common law.

5-3.111 Cases Brought on Behalf of the United States

A. The Environmental Enforcement Section has Departmental responsibility for civil and criminal matters initiated on behalf of the United States to secure the control and abatement for sources of pollution or to protect the natural environment, to the extent that such cases may arise under the statutes identified in USAM 5-3.102, supra, or under the federal common law. As a matter of policy and practice, civil prosecutions are initiated at the request of the Administrator of the Environmental Protection Agency, the Commandant of the Coast Guard, the Chief of Engineers of the United States Army, and other government officials having statutory responsibility for the enforcement of laws designed to protect the public health, welfare, and the environment. Section 12 of the statute that authorized the Department's 1980 budget authorized the Attorney

General with the concurrence of any agency or department with primary enforcement responsibility for an environmental or natural resource law to investigate any violation, and bring such actions as are necessary to enforce such laws. All civil cases brought on behalf of the Administrator of the Environmental Protection Agency must be reviewed and approved in advance by the Assistant Attorney General of the Land and Natural Resources Division prior to filing. Settlement of enforcement cases within the responsibility of the Environmental Enforcement Section require the approval of the appropriate executive agency and the Assistant Attorney General of the Land and Natural Resources Division, with the limited exception of certain Coast Guard cases. Criminal prosecutions may be initiated either as a result of a referral from another executive branch, department, or agency, or upon investigation by the Department of Justice on its own initiative.

B. When apparent violations of the statutes identified in USAM 5-3.102, supra, are brought to the attention of the Department of Justice by persons or agencies other than those with statutory enforcement responsibilities, the Department either forwards those reports to appropriate executive branch enforcement officials for evaluation and possible referral for legal proceedings or, in criminal cases, may itself undertake the necessary investigation and prosecution. The practice of forwarding reports of suspected violations to appropriate agencies has several potential benefits: (1) it allows the agencies to bring to bear their technical expertise to determine whether violations actually have occurred; (2) it allows the agencies to settle cases administratively in certain circumstances; and (3) it allows the agencies to apply technical and investigative resources in order to develop those cases which do have merit.

5-3.120 Overlapping Section Case Responsibility

Although the Environmental Enforcement Section has the primary responsibility for actions involving the statutes identified in USAM 5-3.102, supra, occasionally cases occur which involve those statutes along with statutes for which another section of the Department generally is responsible. In each such case, the chiefs of the respective sections will designate the section which will assume the primary responsibility. The designated section will coordinate with any other concerned section, will furnish copies of all pertinent pleadings and memoranda to that section, and will notify the U.S. Attorney of the names and telephone numbers of attorneys in the other sections who may be contacted for information in their areas of expertise.

5-3.121 Responsibility for Cases With New Issues and/or Altered Character

A. Occasionally issues involving laws for which the Environmental Enforcement Section is responsible may be injected into existing litigation by way of amendment or supplemental pleadings or sua sponte by the court. The U.S. Attorney should not add or raise such matters without first notifying and receiving approval from the Chief of the Environmental Enforcement Section. In cases where such issues have been raised by others, the U.S. Attorney should immediately notify the Chief of the Environmental Enforcement Section to assure that the section can properly perform its responsibilities.

B. On other occasions, the fundamental character of existing litigation may change and environmental enforcement issues may become dominant issues. In such situations, the Environmental Enforcement Section staff attorney responsible for the case shall notify the Section Chief, who may request a transfer of section responsibility if he deems it appropriate. If environmental enforcement issues become dominant in a case in which no Environmental Enforcement Section attorney is directly involved, the U.S. shall notify the Environmental Enforcement Section Chief of the situation and he may make a written request to the Assistant Attorney General of the Land and Natural Resources Division to have the case transferred to the Environmental Enforcement Section.

5-3.200 ORGANIZATION

5-3.210 General

The section is administered by a Chief and three Assistant Chiefs. Within the section, work is assigned among staff attorneys by the Section Chief according to experience and workload. The section has a specific unit which handles criminal, environmental enforcement cases. See USAM 5-3.700, infra. General information relating to the Section or cases within its supervision may be obtained by calling the Chief or Assistant Chiefs at FTS (202) 633-5271 or 633-5403. Information on a specific case should be requested from the staff attorney assigned to that case. When the staff attorney's name is unknown, the docket clerk of the section (FTS (202) 633-5251 or 633-5468) may furnish that information. (Note that a quicker response to inquiries may be forthcoming if the requestor can cite a Departmental file number, e.g., 90-5-1-2-40 or 62-81-2, which generally appears in the upper left-hand corner of correspondence originating from the Department.)

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5-3.300 SUPERVISION AND HANDLING OF ENVIRONMENTAL ENFORCEMENT SECTION CASES

5-3.301 Requests for Instructions

All requests for instructions and guidance relating to the prosecution of actions under the jurisdiction of the Environmental Enforcement Section shall be referred to the Chief of the Environmental Enforcement Section of the Land and Natural Resources Division of the Department of Justice, Washington, D.C. 20530, or to the section attorneys known to be handling such actions.

5-3.302 Transmittal of Papers to Environmental Enforcement Section and Client Agencies

In any case arising under the statutes identified in USAM 5-3.102, supra, one copy of each letter sent or received by a U.S. Attorney as well as one copy of each pleading and paper filed by any party or by the court, shall be forwarded promptly to the Environmental Enforcement Section and one copy shall be forwarded to the referring agency.

5-3.310 Civil Actions, Contempt Actions and Bankruptcy Claims Requiring Prior Approval of the Assistant Attorney General

A. Except for cases identified in USAM 5-3.320, infra, as subject to treatment as direct referrals, no civil action pursuant to statutes under the supervision of the Environmental Enforcement Section, may be initiated by a U.S. Attorney without the prior authorization of the Assistant Attorney General, who shall sign the complaint prior to its being filed. See USAM 5-1.302, supra. Additionally, U.S. Attorneys may not initiate upon direct referral cases arising under the statutes identified in USAM 5-3.320, infra, where relief sought monetary damages or civil penalties in excess of the U.S. Attorneys' settlement authority.

B. Except for cases initially subject to treatment as direct referrals, see USAM 5-3.320, infra, no action in the nature of contempt or enforcement of an order in a case brought pursuant to statutes under the supervision of the Environmental Enforcement Section, see USAM 5-3.102, supra, may be initiated by a U.S. Attorney without the prior authorization of the Assistant Attorney General.

C. Except for claims subject to treatment as direct referrals, see USAM 5-3.320, infra, no claim premised upon statutes under the supervision of the Environmental Enforcement Section, see USAM 5-3.102, supra, may be

filed in a bankruptcy court by a U.S. Attorney without the prior authorization of the Assistant Attorney General.

D. In cases under the supervision of the Environmental Enforcement Section not authorized for direct referral, in which the U.S. Attorney wishes to file an action which has not yet been approved by the Assistant Attorney General, a request for such authority shall be sent to the Assistant Attorney General of the Land and Natural Resources Division, Attention: Chief of the Environmental Enforcement Section.

E. Under the current case-referral system for cases initiated at the request of the Administrator of the Environmental Protection Agency (EPA), when EPA Regional Offices send litigation reports to EPA Headquarters for evaluation, the U.S. Attorney may simultaneously receive copies of those reports. However, the initial litigation report package received from the Environmental Protection Agency Regional Office is informational only and the U.S. Attorneys are not authorized to initiate any civil action until a formal, written request to do so has been forwarded from the Environmental Enforcement Section to the U.S. Attorney. Under current procedures, cases are evaluated by Environmental Protection Agency Headquarters and then forwarded to the Environmental Section with a request for the initiation of a civil action. The section generally forwards to the U.S. Attorney a proposed complaint approved for filing by the Assistant Attorney General of the Land and Natural Resources Division.

5-3.311 Exigent Circumstances

A. Whenever the U.S. Attorney becomes aware of a recently developed situation in his/her district not previously the subject of any report or referral, which merits a temporary restraining order or preliminary injunction, he/she should contact the regional office of the regulatory agency and the Chief of the Environmental Enforcement Section directly by telephone. An example might be the U.S. Attorney's learning of a company's intention to burn hazardous material in an uncontrolled incinerator thereby endangering the lives and health of those living near the incinerator. To prevent such action a temporary restraining order or a preliminary injunction may be in order.

B. Under circumstances which involve immediate threats to life or health, the Chief of the Environmental Enforcement Section may give authorization by telephone for the filing of a complaint and application for a temporary restraining order. If the Section Chief, the Assistant Chiefs, the Deputy Assistant Attorney, the Assistant Attorney General, cannot be reached by telephone, the U.S. Attorney may seek a temporary restraining order to prevent threats to life or health without prior approval.

5-3.320 Direct Referral Civil Cases Not Requiring Prior Approval by the Assistant Attorney General

A. Subject to the qualification set forth in USAM 5-3.310, supra, the following groups of cases arising under the statutes identified in USAM 5-3.102, supra, may be handled by the U.S. Attorneys as direct referrals, i.e., as not requiring specific authorization by the Assistant Attorney General of the Land and Natural Resources Division:

1. Cases referred by the United States Coast Guard for the collection of federal clean up costs or civil penalties under 33 U.S.C. §1321;

2. Miscellaneous proceedings, such as warrants, in assistance to agencies seeking investigative entry under the Clean Water Act, 33 U.S.C. §1318; Clean Air Act, 42 U.S.C. §§7414, 7525; Resource Conservation and Recovery Act, 42 U.S.C. §§6927, 6934; Safe Drinking Water Act, 42 U.S.C. §§300(j)-(4); Toxic Substances Control Act, 15 U.S.C. §2610; Federal Insecticide Fungicide and Rodenticide Act, 7 U.S.C. §136(g).

All other enforcement cases arising under these statutes identified in USAM 5-3.102, supra, require the approval of the Assistant Attorney General before they can be filed.

B. The Assistant Attorney General and his/her designee retain the authority to direct that any case within the responsibility of the Land and Natural Resources Division shall be handled in whole or in part by Division attorneys.

5-3.321 Notification to Environmental Enforcement Section of Intention to File Actions

Prior to filing a civil complaint in a case authorized for direct referral, the U.S. Attorney shall notify the Chief of the Environmental Enforcement Section of the proposed action and shall furnish the section with a copy of the written request from the respective client agency for the initiation of the action. Thereafter, the Environmental Enforcement Section shall be furnished with copies of all pleadings filed in any direct referral case.

5-3.340 Cooperation and Coordination with Environmental Protection Agency

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A. Pursuant to a Memorandum of Understanding with the Environmental Protection Agency, a copy of which is attached, within 60 days of receipt from the Environmental Protection Agency of a formal request to file a suit, the Chief Environmental Enforcement Section is required to decide whether an enforcement action is to be filed.

B. If a determination is made by the Section Chief not to file a complaint, he/she shall report this determination promptly to the Assistant Attorney General and, upon the approval of the determination by the Assistant Attorney General, to the official of the Environmental Protection Agency requesting the initiation of the action.

C. If a determination is made by the Chief to file an action, the complaint, signed by the Assistant Attorney General, shall be filed within 20 days of the determination to file. In the event that any U.S. Attorney or Environmental Enforcement Section attorney does not file such a complaint, he/she shall submit a report to the Assistant Attorney General explaining why such complaint has not been filed, and shall continue to submit such reports at two-week intervals until the complaint is filed or a decision is reached not to file the complaint.

D. If the Department of Justice fails to file a complaint within 120 days of its receipt of a request for litigation and a litigation report by the agency to the Attorney General, then the Administrator may request the Attorney General, to file a complaint within 30 days. Failure of the Department thereafter to file a complaint within the said 30 days may be considered by the Administrator or his/her delegate to be a failure of the Attorney General to notify the Administrator within a reasonable time that he/she will appear in litigation for purposes of Section 305 of the Clean Air Act, 42 U.S.C. §7605; Section 506 of the Federal Water Pollution Control Act, 33 U.S.C. §1366; or Section 1450 of the Safe Drinking Water Act, 42 U.S.C. §300(j)(9). If such a failure occurs, attorneys of the Environmental Protection Agency may represent the Administrator without the U.S. Attorney or Department attorneys. However, the failure of the Attorney General to file a complaint within the time period requested by the Administrator in a case in which the Administrator requested immediate action to protect public health under Sections 311(e) and 504 of the Federal Water Pollution Control Act, 33 U.S.C. §§1321(e) and 1364; Section 303 of the Clean Air Act, 42 U.S.C. §7603; or Section 1450 of the Safe Drinking Water Act, 42 U.S.C. §300(i), may also be considered by the Administrator to be a failure of the Attorney General to notify the Administrator under 42 U.S.C. §7605; 33 U.S.C. §7603; or 42 U.S.C. §300(j)(9).

5-3.400 [RESERVED]

5-3.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-3.510 General

The general instructions set forth in USAM 5-1.500 et seq., supra, with respect to the handling of litigation under the jurisdiction of the Land and Natural Resources Division apply to litigation within the responsibility of the Environmental Enforcement Section.

5-3.520 Investigation and Administrative Processing of Violations

5-3.521 Responsibility for Detecting and Investigating Violations

The primary responsibility for detecting and investigating suspected violations of statutes rests with the federal agencies which are charged by statute with administering those acts. After investigating reports of suspected violations, the respective agencies generally evaluate them internally under their own procedures to determine which matters merit referral to the Department of Justice for prosecution. Generally, whether it goes directly to the U.S. Attorney or to the Land and Natural Resources Division, a referral will be accompanied by a litigation report describing the alleged violation and the evidence available to the agency to support a prosecution.

While primary responsibility for investigating violations of an environmental enforcement statute may reside with the agency administering the act, this does not mean that other agencies, including U.S. Attorneys' offices, should not have a role in this phase of enforcement. Agencies such as the Fish and Wildlife Service of the Interior Department and the National Marine Fisheries Service of the Commerce Department may have personnel in the field who can be important sources of information on suspected illegal activities. Also, some U.S. Attorneys' offices have employed legal technicians, whose duties include assisting the Army Corps of Engineers, Environmental Protection Agency, and Coast Guard in investigating activities proscribed by environmental statutes and preparing cases for litigation.

Because of his/her function as representative of the various federal agencies in legal matters, the U.S. Attorney is in a position to coordinate the investigative efforts of those agencies the violations of environmental statutes. Such coordination can result in more thorough and efficient

case development with fewer resources devoted to duplicative efforts. The U.S. Attorneys, therefore, are encouraged to establish contact with the investigative agencies which operate within their districts, to render to them useful advice regarding sound case development, and to take a lead in creating a cooperative federal effort. The Environmental Enforcement Section is prepared to assist the U.S. Attorneys in establishing contact with personnel of the federal agencies who operate within the various districts.

5-3.522 Transmittal of Reports of Unauthorized Activities

Notwithstanding the source, all reports of violations of environmental enforcement statutes should be referred to the enforcement agencies charged with administering the acts. There are numerous reasons for this policy. In addition to the fact that prompt referral may avert wasteful duplication of federal effort, under certain of the statutes identified in USAM 5-3.102, *supra*, administrative consideration may be a prerequisite to civil enforcement. See, e.g., 42 U.S.C. §7413(a)(1). In some instances, such matters may be resolved administratively without resort to litigation.

5-3.523 Coordination with State Programs

Most states have environmental enforcement programs which overlap, in whole or in part, with federal programs. U.S. Attorneys should familiarize themselves with state environmental enforcement laws and state enforcement officials. Particular attention should be directed toward the following aspects of state-federal relations in the environmental-enforcement field:

A. State environmental-enforcement agencies may be a valuable source of information on suspected violations of federal environmental-enforcement statutes. U.S. Attorneys may be in a position to assist in apprising state officials of the nature of the local federal enforcement program and in developing methods for exchanging information on suspected violations;

B. State authorities often possess evidentiary materials which are relevant to pending federal court proceedings. U.S. Attorneys should be aware of the nature and extent of the states' investigatory resources and should make provision for the regular exchange of information on pending cases with state authorities;

C. Frequently a particular, unauthorized activity constitutes a violation of both federal and state law. U.S. Attorneys should remain advised of pending state environmental enforcement prosecutions. If

it appears that all federal interests in the case will be vindicated in the state court proceeding, action in federal court may be an unnecessary duplication of effort. On the other hand, if federal interests will not be protected completely in state court, federal proceedings may be warranted;

D. A key policy question in determining the source of federal environmental enforcement proceedings is often whether the unauthorized activity would have been permitted if the violator had sought permission in advance. The regulation of federal enforcement agencies, such as that of the Army Corps of Engineers, frequently requires that a permit-applicant obtain all necessary state permits, licenses, easements, etc., before a federal permit will be issued. In some cases, the only substantive objections to an authorized activity may be those which are raised by state authorities. Federal legal proceedings therefore may be directed, in substance, toward vindicating a state interest. In certain of these cases, it might be more appropriate to defer to state prosecution. But even where legal action in federal court appears warranted, the U.S. Attorney will have to maintain close ties with state authorities during all stages of the litigation;

E. Some of the statutes identified in USAM 5-3.102, *supra*, e.g., 33 U.S.C. §1319(b) and 42 U.S.C. §7413(b), specifically require that notice of any federal civil action be given immediately to appropriate state officials;

F. At least one statute, 33 U.S.C. §1319(e), requires that a state be made a party to any enforcement action against one of its municipalities.

5-3.524 Administrative Disposition of Violations

By statute or by regulation, most environmental enforcement agencies have administrative procedures which can result in the disposition of environmental enforcement matters. Generally, U.S. Attorneys should defer legal action until those administrative proceedings have been completed. Court proceedings should be regarded as an adjunct to, and not substitute for the administrative process.

5-3.530 Litigation Procedures; Draft Complaints

Referral packages from the environmental agencies frequently include draft complaints. In direct referral cases the U.S. Attorney is not bound by the form of such a draft complaint, *see* USAM 5-1.513, *supra*, but a well drafted complaint can be helpful in expediting the initiation of an action.

In order to avoid the necessity of redrafting complaints in such cases, U.S. Attorneys should cooperate closely with local agency counsel and advise them as to local practice and the customary local forms of complaints. In cases requiring the approval of the Assistant Attorney General, a draft complaint furnished by the client agency also may be used, or a new draft may be prepared by the Environmental Enforcement Section. Because formats vary from district to district, Environmental Enforcement Section attorneys often will seek guidance from the U.S. Attorney prior to drafting a complaint. Whether an agency is used or a new draft is generated by the Environmental Enforcement Section, once a complaint has been approved and signed by the Assistant Attorney General, it may not be altered prior to filing without the express approval of the Chief of the Environmental Enforcement Section.

5-3.531 Lis Pendens and the Recording of Judgments

In civil environmental enforcement actions for prohibitory or mandatory injunctive relief, complications may arise if the ownership of the property in question changes hands during the pendency of the action. Where there is a threat of transfer of ownership, the U.S. Attorney should consider filing a notice of the pendency of the action, of lis pendens. The steps necessary for the filing of such a notice are determined by the law of the particular state. See 28 U.S.C. §1964.

The final judgment in a civil environmental enforcement prosecution may, in effect, place a permanent burden on the property which was subject to the unauthorized activities. In order to protect the future interests of the United States, the judgment should be recorded in accordance with the requirements of local law and the provisions of 28 U.S.C. §1962 et seq.

5-3.532 Discovery

The Environmental Enforcement Section maintains files of discovery documents which have been employed successfully in past cases. Upon request to the staff attorney, U.S. Attorneys may obtain pertinent, sample interrogatories, requests for admissions, etc., or other assistance in preparing discovery for a particular case. U.S. Attorneys should also be aware that documents which defendants are required to file with other federal agencies, such as the Securities Exchange Commission, Interstate Commerce Commission, and various state and local agencies, can be an important source of information and discovery.

5-3.533 Trial Assistance

In cases in which U.S. Attorneys have primary litigating responsibilities, they are encouraged to request assistance in trial preparation from the Environmental Enforcement Section staff attorney assigned to a case. Section staff attorneys often are in a position to obtain legislative histories, archive materials, and technical information which is not readily available in U.S. Attorneys' offices. Memoranda, trial briefs, information on unreported cases, and other material relevant to environmental cases also can be obtained through the staff attorneys. Additionally, the section keeps a file on expert witnesses used in various cases and is able to procure the services of expert witnesses through the headquarters of a number of different agencies in Washington, D.C.

5-3.534 Pleading Files

The Environmental Enforcement Section maintains copies of papers filed in environmental cases in the various districts which may be of value to U.S. Attorneys in other districts. Upon request, staff attorneys in the section will furnish copies of such documents to the U.S. Attorneys.

5-3.600 SETTLEMENT AND DISMISSAL OF CASES

5-3.610 General

With the one exception of Coast Guard penalty collection cases addressed below, U.S. Attorneys are not authorized to settle or dismiss any case arising under any of the statutes identified in USAM 5-3.102, supra. Any offer to settle or dismiss any case arising under any of the statutes or dismiss any such suit must be directed to the Chief of the Environmental Enforcement Section, who will forward the offer, with his/her recommendation, to an appropriate level for decision. Offers to settle or compromise in direct referral cases, when transmitted to the Environmental Enforcement Section, should be accompanied by the recommendation of the referring agency.

The U.S. Attorneys are authorized to compromise any case referred to them by the Coast Guard for the collection of a civil penalty imposed pursuant to 33 U.S.C. §1321. (Checks submitted for the payment of civil penalties should be forwarded to the referring agency for disposition.)

5-3.611 Transmittal of Settlement Offers

Any offer to settle or dismiss an action which the U.S. Attorney is not authorized to compromise shall be transmitted to the Environmental Enforcement Section attorney assigned to the case for consideration and disposition at the appropriate level. Such offers should be accompanied by the written comments and recommendation of the referring U.S. Attorney and of the referring agency. In emergency situations, such as with settlement offers received during trial or settlement offers dealing exclusively with monetary damages or penalties, those offers may be communicated to the Chief of the Environmental Enforcement Section by telephone.

5-3.612 Solicitations of Agency Views

U.S. Attorneys should remain in continuing communication with the referring agency prior to and during settlement negotiations. This will insure that the proposals being discussed are compatible with agency policies and regulations and facilitate agency approval.

Additionally, agencies other than the referring agency may have statutory review responsibilities in connection with work in navigable waters. For example, the Fish and Wildlife Service has the responsibility to review, comment on, and make recommendations as to such work under the Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§661-666. In the interests of inter-agency cooperation, the views of these agencies should at least be considered before an offer in compromise is accepted or transmitted to the Environmental Enforcement Section.

5-3.613 Settlement Policy in Suits Brought on Behalf of the Administrator of the Environmental Protection Agency

Frequently, cases brought on behalf of the Administrator of the Environmental Protection Agency result in agreed judgments or consent decrees. Copies of consent decrees in previously settled cases are available from the Environmental Enforcement Section.

To assist U.S. Attorney's offices in understanding the types of settlements and language in decrees which are acceptable, the following general guidance is provided:

A. Defendants should be informed that any settlement must be approved by the Assistant Attorney General of the Land and Natural Resources Division and by the Administrator of the Environmental Protection Agency, and are subject to review by them. This is a requirement of the Memorandum

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of Understanding with the Environmental Protection Agency, which follows at USAM 5-3.633.

B. Defendants should be advised that only the Department of Justice and the attorneys specifically designated may bind the United States to any agreement.

C. The pendency of settlement negotiations should not cause a cessation of litigating activities. Defendants in enforcement cases often are more amenable to settlements favorable to the United States when discovery and trial preparations proceed in parallel with settlement negotiations;

D. In no civil settlement agreement does the Land and Natural Resources Division deal away the ability of the United States to undertake criminal prosecutions in appropriate circumstances;

E. All correspondence and other communication from a defendant must come through the U.S. Attorney or the Environmental Enforcement Section;

F. Defendants should be advised that the United States is bound only by the provisions actually set forth in any consent decree, and that no alleged agreement, written or oral, with any client agency representative or with anyone else, which does not appear on the face of a decree, in any way alters the actual terms of that decree.

5-3.620 Consent Decrees; Public-Notice Policy

A. Consent judgments in actions in which the complaint seeks to enjoin the discharge or emission of pollutants, after being approved by the Assistant Attorney General, are to be lodged with the court and made available for public inspection for a period of 30 days prior to their entry. This is required by Departmental Order No. 529-73, 38 Fed. Reg. 19029, dated July 17, 1973, 28 C.F.R. §50.7, which, in its entirety, reads as follows:

1. It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to enjoin discharges of pollutants in the environment only after or on condition that an opportunity is afforded persons (natural or corporate) who are not named as parties to the action to comment on the proposed judgment prior to its entry by the court;

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2. To effectuate this policy, each proposed judgment which is within the scope of Paragraph A of this section, shall be lodged with the court as early as feasible but at least 30 days before the judgment is entered by the court. Prior to entry of the judgment, or some earlier specified date, the Department of Justice will receive and consider, and file with the court, any written comments, views or allegations relating to the proposed judgment. The Department shall reserve the right (a) to withdraw or withhold its consent to the proposed judgment if the comments, views and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper or inadequate and (b) to oppose an attempt by any person to intervene in the action;

3. The Assistant Attorney General in charge of the Land and Natural Resources Division may establish procedures for implementing this policy. Where it is clear that the public interest in the policy hereby established is not compromised, the Assistant Attorney General may permit an exception to this policy in a specific case where extraordinary circumstances require a period shorter than 30 days or a procedure other than state herein.

B. Criminal actions, suits for the imposition of civil penalties, and actions pursuant to 33 U.S.C. §403 for injunctive relief are not covered by this policy.

C. The purpose of the provision is to allow the public to comment and to allow Executive Branch to receive the benefit of such input, and to allow it to withdraw or modify its consent to the decree based upon such information.

D. Whenever a proposed consent decree is lodged with the court pursuant to 28 C.F.R. §50.7, the U.S. Attorney shall notify the Environmental Enforcement Section of that fact immediately, in order that the section may have notice of the proposed settlement published in the Federal Register.

E. In some instances district judges have proceeded to enter consent decrees prior to the expiration of the public notice and comment period. If this should occur, the U.S. Attorney must notify the Environmental Enforcement Section of that fact immediately.

F. When the public comment period has expired, the Environmental Enforcement Section will notify the U.S. Attorney as to whether any comments have been received by the Division and will forward such comments for filing with the court. If the Environmental Enforcement Section or the respective client agency intends to respond to any public comments, the Environmental Enforcement Section will notify the U.S. Attorney of that fact.

5-3.630 Procedures Following Entry of a Consent Decree

5-3.631 Amendment of Existing Consent Decree

A. The terms of an existing consent decree may be amended only with the approval of the Assistant Attorney General of the Land and Natural Resources Division. If amendments are only procedural in nature and are not extensive, they may be effected by stipulation or by amendment without the notice and comment by 28 C.F.R §50.7 (when that regulation applies), depending upon the circumstances of the case. If amendments are extensive or are substantive in nature, they must be treated as if they were a new consent decree with respect to the requirements of 28 C.F.R §50.7.

B. Under no circumstances shall the terms of an existing consent decree be altered by oral agreement or by written correspondence or by any other means except an amendment or a stipulation, as appropriate, executed by the parties and filed with the court.

5-3.632 Violations of Consent Decrees

A. It is the policy of the Land and Natural Resources Division to enforce the terms of existing consent decrees.

B. In all cases in which the filing of the complaint or the original settlement required Departmental approval, an action to enforce an existing decree shall be commenced only with the approval of the Assistant Attorney General of the Land and Natural Resources Division.

5-3.633 Memorandum Of Understanding Between The Department Of Justice
And The Environmental Protection Agency

WHEREAS, the Department of Justice conducts the civil
litigation of the Environmental Protection Agency;

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WHEREAS, the conduct of that litigation requires a close and cooperative relationship between the attorneys of the Department of Justice and of the Environmental Protection Agency;

WHEREAS, the achievement of a close and cooperative relationship requires a clarification of the respective roles of the attorneys of the Department of Justice and of the Environmental Protection Agency;

WHEREAS, the Attorney General may decline to represent the Agency in particular civil actions, in which case the Agency may be represented by its own attorneys; and

WHEREAS, most challenges to and enforcement of regulatory standards and procedures adopted by the Environmental Protection Agency involve scientific, technical and policy issues and determinations developed in lengthy rule-making proceedings in which the Agency's attorneys have been involved and can provide the necessary expertise.

NOW, therefore, the following Memorandum of Understanding is entered into between the Attorney General of the United States and the Administrator of the Environmental Protection Agency for the purpose of promoting the efficient and effective handling of civil litigation involving the Environmental Protection Agency;

A. The Attorney General of the United States (hereinafter referred to as the "Attorney General") shall have control over all cases to which the Environmental Protection Agency (hereinafter referred to as the "Agency") or the Administrator of the Environmental Protection Agency (hereinafter referred to as the "Administrator") is a party.

B. When requested by the Administrator, the Attorney General shall permit attorneys employed by the Agency (hereinafter referred to as "Agency participating attorneys") to participate in cases involving direct review in the Courts of Appeal, and shall also permit such attorneys to participate in other civil cases to which either the Agency or the Administrator are a party, provided, however, that:

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1. the Administrator or his delegate shall designate a specific Agency participating attorney for each case and shall communicate the name of such attorney in writing to the Attorney General;

2. such Agency participating attorney shall be subject to the supervision and control of the Attorney General; and

3. if required by the Attorney General, an Agency participating attorney shall be appointed as a Special Attorney or Special Assistant U.S. Attorney and take the required oath prior to conducting or participating in any kind of Court proceedings.

C. Agency attorneys shall not file any pleadings or other documents in a court proceeding without the prior approval of the Attorney General.

D. It is understood that participation by Agency attorneys under this memorandum includes appearances in Court, participation in trials and oral arguments, participation in the preparation of briefs, memoranda and pleadings, participation in discussions with opposing counsel, including settlement negotiations, and all other aspects of case preparation normally associated with the responsibilities of an attorney in the conduct of litigation; provided, however, that the Attorney General shall retain control over the conduct of all litigation. Such control shall include the right to allocate tasks between attorneys employed by the Department of Justice and Agency participating attorneys. In allocating tasks between the Department's and the Agency's attorneys, the Attorney General shall give due consideration to the substantive knowledge of the respective attorneys of the matter at issue so that the government's resources are utilized to the best advantage.

E. In the event of any disagreement between attorneys of the Department of Justice and of the Agency concerning the conduct of any case, the Administrator may obtain a review of the matter in question by the Attorney General. The Attorney General shall give full

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consideration to the views and requests of the Agency and shall make every effort to eliminate disagreements on a mutually satisfactory basis. In carrying out such reviews, the Attorney General shall consult with the Administrator. In implementing this provision, it is understood that the Attorney General will not be expected by the Administrator to interfere with the direction of any trial in progress.

F. The settlement of any case in which the Department of Justice represents the Agency or the Administrator shall require consultation with and concurrence of both the Administrator and the Attorney General.

G. The Administrator and the Attorney General shall make an annual review of both the Department's and the Agency's personnel requirements for Agency litigation. The Attorney General and the Administrator will cooperate in making such appropriation requests as are required to maintain their respective staffs at a level adequate to the needs of the Agency's litigation.

H. The Attorney General shall establish specific deadlines, not longer than 60 days, within which the Department's Attorneys must either file complaints in Agency cases or report to the Attorney General why any such complaint has not been filed. In the event any Department Attorney does not file a complaint, he shall thereafter submit further periodic reports to the Attorney General until the complaint is filed or a decision is reached that it shall not be filed. Copies of the reports required by this section shall be provided to the Agency if requested.

I. If the Attorney General fails to file a complaint within 120 days of the referral of a request for litigation and a litigation report by the Agency to the Attorney General, then the Administrator may request the Attorney General to file a complaint within 30 days. Failure of the Attorney General to thereafter file a complaint within the said 30 days may be considered by the Administrator or his delegate to be a failure of the Attorney General to notify the Administrator within a reasonable time that he will appear in litigation for purposes of Section 305 of the Clean Air Act, 42 U.S.C. §1857(h)(3); Section 506 of the Federal Pollution

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Control Act, 33 U.S.C. §1336; or Section 1450 of the Safe Drinking Water Act, 42 U.S.C. §300(j)(9); provided, however, that the failure of the Attorney General to file a complaint within the time period requested by the Administrator in a case in which the Administrator requested immediate action under Sections 311(e) and 504 of the Federal Water Pollution Control Act, 33 U.S.C. §§1321, 1364; Section 303 of the Clean Air Act, 42 U.S.C. §1857(h)(1); or Section 1431 of the Safe Drinking Water Act, 42 U.S.C. §300(i); to protect public health may also be considered by the Administrator to be a failure of the Attorney General to so notify the Administrator under Section 305 of the Clean Air Act, 506 of the Federal Water Pollution Control Act or Section 1450 of the Safe Drinking Water Act.

J. All requests of the Agency for litigation shall be submitted by the Agency through its General Counsel or its Assistant Administrator for Enforcement to the Assistant Attorneys General for the Land and Natural Resources Division or for the Civil Division, except matters requiring an immediate temporary restraining order may be submitted by Regional Administrators of the Agency simultaneously to a U.S. Attorney and the appropriate Assistant Attorney General. All requests for litigation shall be accompanied by a standard litigation report which shall contain such information as shall be determined from time to time by the Attorney General to be necessary in order to prosecute Agency litigation. Similar reports shall also be provided for suits in which the Agency or the Administrator is a defendant, as requested by the Attorney General.

K. The Agency shall make the relevant file of any matter that is the subject of litigation available to attorneys for the Department of Justice at a convenient location when a request for litigation is submitted or when the Department is required to defend the Agency or the Administrator.

L. The Administrator shall undertake to review the Agency's procedures for the preparation of the record in cases involving direct review in the Courts of Appeal, including analyses of such matters as assembly,

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indexing, pagination, timing of preparation, and the allocation of tasks between the Agency and the Department. The Administrator shall consult with the Attorney General on the re-examination of these procedures.

M. The negotiation of any agreement to be filed in court shall require the authorization and concurrence of the Attorney General.

N. In conducting litigation for the Administrator, the Attorney General shall defer to the Administrator's interpretation of scientific and technical matters.

O. Nothing in this agreement shall affect any authority of the Solicitor General to authorize or decline to authorize appeals by the government from any district court to any appellate court or petitions to such courts for the issuance of extraordinary writs, such as the authority conferred by 28 C.F.R. §0.20, or to carry out his traditional functions with regard to appeals to or petitions for review by the Supreme Court.

P. In order to effectively implement the terms of this Memorandum, the Attorney General and the Administrator will transmit copies of this Memorandum to all personnel affected by its provisions. This Memorandum shall not preclude the Department and the Agency from entering into mutually satisfactory arrangements concerning the handling of a particular case.

Q. This Agreement shall apply to all cases filed on or after the date of approval of this Agreement by the Attorney General and the Administrator.

R. The Attorney General and the Administrator may delegate their respective functions and responsibilities under this Agreement.

S. The Department and the Agency shall adjust the conduct of cases arising before the effective date of this Agreement in a manner consistent with the spirit of this Agreement.

5-3.700 CRIMINAL CASES

The Assistant Attorney General of the Land and Natural Resources Division is responsible for the proper handling and administration of

criminal cases arising under the statutes identified in USAM 5-3.102, supra. Within the Environmental Enforcement Section of the Land and Natural Resources Division, the Environmental Crimes Unit has been formed specifically to deal with cases involving criminal violations of the environmental statutes for which the section is responsible. See USAM 5-10.110, infra, for cases involving criminal violations of statutes for which the Wildlife and Marine Resources Section is responsible.

5-3.701 Principal Criminal Statutory Provisions

The principal criminal provisions of the environmental statutes for which the Environmental Enforcement Section is responsible are identified below:

A. Clean Water Act or Federal Water Pollution Control Act: 33 U.S.C. §1319(c)(1) (willful or negligent conduct in violation of specified section of Act); 33 U.S.C. §1319(c)(2) (knowingly submitting false statement); and 33 U.S.C. §1321(b)(5) (failure to notify of known discharge of oil or hazardous substance).

B. Refuse Act: (Section 13, River and Harbor Act); 33 U.S.C. §§407, and 411 (discharge of refuse into navigable waters of their tributaries without a permit).

C. Clean Air Act: 42 U.S.C. §7413(c) (knowing conduct in violation of specified section of Act); 42 U.S.C. §7413(c)(2) (knowingly submitting false statements);

D. Toxic Substances Control Act: 15 U.S.C. §2615 (knowingly or willfully committing any of the acts prohibited by 15 U.S.C. §2614);

E. Resource Conservation and Recovery Act: 42 U.S.C. §6928(d)(1) (knowingly transporting hazardous waste to unpermitted facility); 42 U.S.C. §6928(d)(2) (knowingly treating, storing, or disposing of hazardous waste without permit or in violation of permit); 42 U.S.C. §6928(d)(4) (knowingly making false statements); 42 U.S.C. §6928(d)(4) (knowingly destroying, altering, or concealing records); 42 U.S.C. §6928(e) (knowing endangerment)

F. Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"): 42 U.S.C. §9603 (failure to report known release of hazardous substance to the environment and failure to notify EPA; of the existence of a hazardous waste facility);

G. Federal Insecticide, Fungicide and Rodenticide Act: 7 U.S.C. §136(1) (knowing violations of specified sections of Act).

The statutes identified in USAM 5-3.102, supra, contain other criminal provisions; however, those identified above are the ones most commonly involved in criminal cases handled by the Environmental Enforcement Section.

5-3.702 Other Criminal Provisions

Because experience has shown that cases involving violations of the federal environmental laws identified in USAM 5-3.102, supra, also may involve violations of certain other federal statutes, the Environmental Enforcement Section is empowered to investigate and prosecute violations of additional criminal statutes when such violations arise within the context of criminal cases for which the section is primarily responsible. Examples limited of the types of statutes arising in those cases include, but are not limited to, the following:

<u>Statute</u>	<u>Subject Matter</u>
18 U.S.C. §2	Aiding and abetting
18 U.S.C. §287	False claims
18 U.S.C. §371	Conspiracy
18 U.S.C. §641	Theft or conversion of public Property or money
18 U.S.C. §1001	False statement
18 U.S.C. §1341	Mail Fraud
18 U.S.C. §1342	Wire fraud
18 U.S.C. §1505	Obstruction of administrative proceedings
18 U.S.C. §§1621-1623	Perjury

5-3.710 Environmental Crime Unit

Within the Environmental Enforcement Section, criminal cases arising under the statutes identified in USAM 5-3.102, supra, are handled by the Environmental Crimes Unit. The Environmental Crimes Unit is administered by a Director who is supervised by the Chief of the Environmental Enforcement Section. Inquiries about criminal cases arising under the statutes listed in USAM 5-3.102, supra, should be made to the Chief of the Environmental Enforcement Section or the Director of the Environmental Crimes Unit at FTS (202)633-5271 or 633-3575. Within the unit, cases are assigned to attorneys according to experience and workload. Information on specific cases should be obtained from the staff attorney assigned to that case, from the Section Chief or the Director of the Environmental

Crimes Unit. In those cases in which attorneys from the Environmental Crimes Unit take a direct role, they may share responsibility for criminal environmental enforcement cases in cooperation with the U.S. Attorneys' offices in various districts or they may take the entire responsibility for litigating such cases. See USAM 5-3.721, supra. In cases handled entirely by the U.S. Attorney, in which Environmental Crimes Unit takes no direct role in the litigation, unit resources are available to provide support for the efforts of the U.S. Attorneys; for example, by doing legal research, preparing draft papers, and providing advice on policy questions and on related cases in other districts. The Environmental Crimes Unit also is responsible for the monitoring of criminal prosecutions under the statutes identified in USAM 5-3.102, supra, to assure consistency of statutory interpretations and of enforcement policy among the districts.

5-3.720 General Provisions and Procedures

5-3.721 Litigation Responsibility; Retention of Authority

Primary responsibility for handling cases will be determined on a case-by-case basis. Experience has demonstrated that very satisfactory results may be obtained from a cooperative, joint effort, the U.S. Attorney's office contributing its familiarity with local practices and procedures and the Environmental Crimes Unit adding subject-matter expertise and the experience gained in conducting grand jury proceedings and trials in similar cases.

In any case arising under the statutes identified in USAM 5-3.102, supra, the Assistant Attorney General of the Land and Natural Resources Division retains the authority to assume primary responsibility for handling cases within the jurisdiction of the Land and Natural Resources Division.

There are no precise rules for determining whether a criminal environmental case is to be handled by the U.S. Attorney's office, by the Environmental Crimes Unit, or jointly by attorneys from both offices. The decision will be made by the Assistant Attorney General of the Land and Natural Resources Division in consultation with the U.S. Attorney on a case-by-case basis. The Assistant Attorney General, or his/her designee, shall notify the U.S. Attorney of assignment of trial responsibility.

5-3.722 Case Development

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A. Criminal cases under the statutes identified in USAM 5-3.102, supra, may be investigated and developed by personnel of any of the client-agencies responsible for administering those statutes. Those client-agencies include the Environmental Protection Agency, the United States Coast Guard, the Army Corps of Engineers, and the Department of Commerce. See 33 U.S.C. §1321(p). Cases under those statutes also may be investigated and developed by the Federal Bureau of Investigation (FBI) or by other federal agencies. When FBI assistance is requested by a U.S. Attorney, the U.S. Attorney should notify the Director of the Environmental Crimes Unit of that fact.

B. The primary source of cases for investigation and prosecution with respect to the statutes over which the Environmental Enforcement Section has jurisdiction is the Environmental Protection Agency. The personnel within EPA responsible for investigation of criminal cases are the criminal investigators assigned to the Criminal Enforcement Division (CED). Investigators assigned to the CED are located in field offices in various parts of the country. U.S. Attorneys who wish to call upon the CED investigators to look into matters within their districts should make such requests through the Special-Agent-in-Charge of the appropriate field office. A current listing of field offices and their personnel can be obtained through the Criminal Enforcement Division of the Environmental Protection Agency (FIS (202)557-7410). Technical support for the development of criminal enforcement cases by EPA generally comes from agency personnel assigned to the EPA Regional Offices or the staff of EPA's National Enforcement Investigation Center (NEIC) located in Denver, Colorado. NEIC personnel may work on investigations throughout the country. Coordination of the support available from these groups generally is effected by the CED investigators.

The Department of Justice also retains the ability to develop enforcement actions through its own efforts.

5-3.723 Environmental Case Referrals

The procedure in effect for initiation of criminal cases arising under the statutes identified in USAM 5-3.102, supra, is by referral from the agencies listed in USAM 5-3.722(a), supra, to the Assistant Attorney General, Land and Natural Resources Division. Copies of the referrals are also simultaneously transmitted to the U.S. Attorney in the district with jurisdiction over the matter.

Referral packages will generally contain an investigative report (which includes an explanation of the alleged offense(s), a description of the evidence which would support a prosecution, the identification of any

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witnesses, and any perceived weaknesses of the case), and any exhibits which may aid in the understanding of the referral. However, in some instances it may be necessary to complete the development of the cases through the use of the grand jury.

5-3.724 Authority to Prosecute; Retention of Authority; Requests for Assistance

The U.S. Attorney may commence the prosecution of any referral arising under the statutes identified in USAM 5-3.102, supra, upon receipt of such referral, provided that notification is given as set forth in USAM 5-3.725, infra, unless requested not to do so by the Assistant Attorney General of the Land and Natural Resources Division. The Assistant Attorney General may request U.S. Attorneys not to commence prosecution of a referred matter if in his judgment additional review of the referral is required of the Land and Natural Resources Division, and U.S. Attorneys shall not proceed until the Assistant Attorney General has completed the necessary review. In any prosecution commenced by a U.S. Attorney, the U.S. Attorney may request Environmental Crimes Unit assistance by either calling or writing to the Assistant Attorney General, Land and Natural Resources Division, Attention: Chief, Environmental Enforcement Section.

In cases arising under the statutes listed in USAM 5-3.102, supra, the U.S. Attorney shall forward to the Environmental Crimes Unit a copy of any indictment or information prior to its being presented or filed and a copy of any indictment or information immediately upon its return or filing.

5-3.725 Information to be furnished to the Assistant Attorney General by the U.S. Attorney

With regard to cases being handled entirely by the U.S. Attorney, within 30 days of receipt of any referral under the statutes identified in USAM 5-3.102, supra, the U.S. Attorney shall advise the Director of the Environmental Crimes Unit of the identity of any Assistant U.S. Attorney to whom the case has been assigned. Notification of decisions to either prosecute or decline cases shall be given by the U.S. Attorney or an assistant to the Chief, Environmental Enforcement Section, Attention: Director, Environmental Crimes Unit. Notification of the presentation of evidence to a grand jury shall be given to the Chief, Environmental Enforcement Section Attention: Director Environmental Crimes Unit. See USAM 5-3.751, infra, regarding other information which should be forwarded to the Environmental Crimes Unit.

5-3.726 Cases Arising by Other Than Client Agency Referral

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U.S. Attorneys retain their authority to prosecute cases under statutes listed in USAM 5-3.102, supra, which are not developed or referred to them from another federal agency. The U.S. Attorney shall notify the Assistant Attorney General of the Land and Natural Resources Division of the initiation of a prosecution under the statutes identified in USAM 5-3.102, supra, to enable the Land and Natural Resources Division to perform its oversight responsibilities for prosecution under such statutes.

Whenever, in the context of a case not otherwise within the jurisdiction of the Land and Natural Resources Division, a U.S. Attorney becomes aware of information which indicates that such case may include violations of any statute identified in USAM 5-3.102, supra, the U.S. Attorney shall advise the Assistant Attorney General of the Land and Natural Resources Division of that possibility. Upon request of the Assistant Attorney General, the U.S. Attorney shall forward to the Assistant Attorney General copies of relevant material, including grand jury transcripts.

5-3.730 Initiating and Concluding Prosecution

5-3.731 Individual and Corporate Defendants

A. Congress has demonstrated its intent that individuals, as well as corporations, should be criminally prosecuted for violations of federal environmental laws, see, e.g., 33 U.S.C. §§1319(c)(3) and 1362(5), thereby recognizing the fact the unlawful acts or omissions of corporations actually can be traced to individual officers or employees. That Congressional intent should be given serious consideration in the development of prosecutions for violations of the statutes identified under USAM 5-3.102, supra.

B. In any case against both a corporation and any of its individual employees the willingness of the offending corporation to enter a guilty plea is not a basis for dismissal as against the individual.

5-3.732 Attorneys Who May Represent the United States

A. All criminal environmental cases must be handled by attorneys who are either employed by the Department of Justice or are authorized by the Department to represent the United States. When circumstances require the use of client agency attorneys in either a grand jury investigation or the actual litigation of any case involving violations of statutes identified in USAM 5-3.102, supra, prior notification shall be given to the Assistant Attorney General of the Land and Natural Resources Division. In any cases

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in which the Land and Natural Resources Division has primary responsibility for prosecution, authority for agency attorneys to participate in grand jury investigations or litigation shall be obtained from the Assistant Attorney General of the Land and Natural Resources Division. Notification of and requests for such authorization should be submitted to the Assistant Attorney General in sufficient time to permit other arrangements to be made should the request not be approved. Copies of the request by the U.S. Attorney should also be sent to the Chief of the Environmental Enforcement Section.

B. Any appointment of a client agency attorney to a special status shall specify (1) the scope of the attorney's appointment in terms of subject matter to the direction of the U.S. Attorney and/or the Assistant Attorney General of the Land and Natural Resources Division.

5-3.740 Dispositions

5-3.741 Declinations

A. The U.S. Attorney may decline to prosecute any case arising under the statutes identified in USAM 5-3.102, supra, which is being handled entirely by his/her office by notifying the referring client agency of his/her decision in writing with an explanation of the reasons for that decision and an explanation of the referring agency's position regarding declination. A copy of that decision and explanation shall be sent to the Assistant Attorney General of the Land and Natural Resources Division.

B. The Assistant Attorney General may choose to prosecute any case declined by a U.S. Attorney, with attorneys of the Environmental Crimes Unit conducting such prosecution. The Assistant Attorney General may request from the U.S. Attorney whatever additional information is deemed necessary in order to decide whether to proceed with the prosecution of a referral declined by a U.S. Attorney.

C. The procedures described above also shall be followed in any case resulting in a no bill after presentation to the grand jury, if the U.S. Attorney is of the opinion that prosecution should not proceed in such case.

5-3.742 Dismissals

Indictments, informations, or complaints in criminal cases involving

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violations of the statutes identified in USAM 5-3.102, supra, and referred in accordance with USAM 5-3.723, supra, shall not be dismissed without prior approval of the Assistant Attorney General of the Land and Natural Resources Division, except when a superseding indictment has been returned or an information or a complaint has been filed against the same defendant or when the individual defendant has died. Recommendations to dismiss criminal cases are the responsibility of the U.S. Attorney personally and must be signed by him/her. This provision does not apply to situations of plea agreements which involve the dismissal of certain counts of an indictment or information coupled with guilty pleas to other counts.

5-3.750 Coordination

5-3.751 Status Reports

A. Once a case has been referred to a U.S. Attorney, the Land and Natural Resources Division shall be kept informed of all its developments. In addition to the information called for in USAM 5-3.275, supra, the following information shall be furnished promptly to the Environmental Enforcement Section in all cases arising under the statutes identified in USAM 5-3.102, supra:

1. Date the indictment (or no bill) is returned or the information or complaint is filed;
2. Date of arraignment and kind of plea;
3. Dates of trial;
4. Verdict;
5. Change of plea or plea bargain;
6. Any motion which could, if granted, be dispositive; which could affect the enforceability of the relevant statute(s); or which otherwise is considered significant by the U.S. Attorney; and
7. Date and terms of sentence.

B. Significant developments should be reported immediately by telephone to the Chief, Environmental Enforcement Section, or the Director of the Environmental Crimes Unit in any case in which the unit requests reports. In addition, forty-eight (48) hours prior notification shall be given to the Environmental Crimes Unit in such cases before presenting an

indictment or filing an information.

C. In all criminal cases arising under the statutes identified in USAM 5-3.102, supra, the U.S. Attorney shall furnish to the Environmental Crimes Unit copies of all papers filed and correspondence exchanged regarding such cases.

5-3.760 Appeals

5-3.761 Handling of Appeals

All appeals in criminal cases arising under the statutes identified in USAM 5-3.102, supra, shall be handled as provided for in USAM 5-8.310 and USAM 2-3.210.

5-3.762 Notice of Appeals

A. The U.S. Attorney shall immediately notify the Director of the Environmental Crimes Unit of any notice of appeal by a defendant in any case arising under any statute identified in USAM 5-3.102, supra.

B. In any such case in which the U.S. Attorney believes that appeal by the United States is warranted, he/she shall make his/her recommendation to the Director of the Environmental Crimes Unit.

C. For purposes of subparagraphs A and B above, notifications and recommendations may be made by telephone in expedited appeal situations.

5-3.763 Record on Appeal

Whenever an appeal is taken in a case arising under any statute identified in USAM 5-3.102, supra, for which the U.S. Attorney has taken primary trial level responsibility, and that appeal is to be handled by the Land and Natural Resources Division, the U.S. Attorney is responsible for assembling and transmitting to the Land and Natural Resources Division those items which constitute the record of the case at the trial court level.

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5-4.000 LAND ACQUISITION SECTION

5-4.001 Establishment

The handling of matters relating to the condemnation of land was first assigned to the Public Lands Division (now the Land and Natural Resources Division) by former Attorney General Daugherty in General Order No. 1200, dated July 20, 1921. By Order No. 1823, dated May 19, 1927, former Attorney General Sargeant transferred this duty to the Admiralty Division. On February 1, 1930, this work was reassigned to the Public Lands Division by Order No. 2085 signed by former Attorney General John Mitchell. A special Condemnation Section was established, effective November 1, 1937, by former Assistant Attorney General for Lands Division Carl McFarland, in a Memorandum signed October 30, 1937. In 1946, the name of the Section was changed by former Assistant Attorney General David Bazelon to Land Acquisition Section.

In 1941, the general duty of passing upon titles to land purchased by the United States was imposed on the Attorney General. This function was assigned to the Lands Division by the same Orders of the Attorney General as those which assigned the duty of acquiring land by condemnation. This duty to approve titles is assigned to the Land Acquisition Section.

5-4.100 AREA OF RESPONSIBILITY

5-4.110 General

The Land Acquisition Section is responsible for the institution and prosecution of condemnation proceedings on behalf of the United States, and for approving title to land acquired by the United States by purchase or condemnation.

5-4.120 Statutes Administered

The litigation of the Land Acquisition Section is conducted pursuant to the following authorities:

A. Act of August 1, 1888, c. 728, §1, 25 Stat. 357, as amended, 40 U.S.C. §257 (Condemnation Act);

B. Act of February 26, 1931, c. 307, §1, 46 Stat. 1421, 40 U.S.C. §158a-f (Declaration of Taking Act);

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C. Act of August 27, 1958, 72 Stat. 892, 23 U.S.C. §107 (interstate highway rights-of-way acquisition);

D. Rule 71A, Federal Rules of Civil Procedure;

E. 16 D.C. Code §§1351-1368 (1973 ed.) (federal land acquisition in the District of Columbia);

F. Joint Resolution of September 11, 1841, 5 Stat. 468, as amended, 40 U.S.C. §255 (Examination of Title Act).

5-4.200 ORGANIZATION

The Section is administered by a Chief, who is assisted by two Assistant Chiefs. The Section is divided into a number of units.

A. Litigation Unit

Attorneys assigned to the Litigation Unit supervise the handling of all cases and handle all aspects of certain cases including pre-trial, trial and post-trial activities.

B. Title Unit

The Title Unit prepares opinions of title for land acquired by the United States by purchase pursuant to the provisions of 40 U.S.C. §255.

C. Appraisal Unit

The Appraisal Unit reviews appraisals, settlement proposals and appraisal guidelines for cases in condemnation and provides assistance to Section attorneys and U.S. Attorneys in trial preparation and procedures. See USAM 5-9.100, infra, for further information concerning the function of this unit.

D. Administrative Unit

The Administrative Unit is responsible for processing all requests for the institution of condemnation proceedings; preparing all intermediate and final opinions of title of the Attorney General; and managing LDTS, a comprehensive computer-based information system designated to track all significant events from the time of its inception through final disposition of the case.

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5-4.300 SUPERVISION AND HANDLING OF LAND ACQUISITION SECTION CASES

5-4.310 Direct Referral Cases

Land acquisition cases may not be referred directly to U.S. Attorneys by agencies. Actions to acquire land may not be initiated by a U.S. Attorney except upon their referral to him/her by the Attorney General, through the Land Acquisition Section.

5-4.320 Assignment of Case Responsibility

The extent to which a U.S. Attorney is responsible for handling any condemnation case is determined by the classification given that case by the Land Acquisition Section. Condemnation matters are classification. A case may be reclassified at any time if this becomes necessary due to changed circumstances.

5-4.321 Category 1 Matters

Category 1 consists of cases in which there are no actual or anticipated policy questions, peculiar appraisal problems, novel legal questions, or claimed compensation in excess of \$100,000. U.S. Attorneys will have full responsibility for the Category 1 cases, subject only to:

A. Such assistance on tactical or legal matters as they may request from the Department of Justice; and

B. Approval of the Justice Department of any settlement in excess of \$100,000 or under that amount when:

1. for any reason, the compromise of a particular claim, as a practical matter, will control or adversely influence the disposition of related claims totaling an amount in excess of \$100,000; or

2. when the reversion under 40 U.S.C. §285f of any land or improvements or any interests in land are involved, except in cases in which the land owner desires to remove buildings, trees and shrubs, crops, or fixtures attached to the realty which are not needed or desired by the government, provided that the exclusion has been approved by the local representative of the acquiring agency; or

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3. because a novel issue of law or question of policy is presented, or for any other reason, the settlement offer should receive the attention of the Land and Natural Resources Division of this Department.

The U.S. Attorney should send copies of court papers to the Department of Justice for information, comment, and suggestions, and should cooperate in the reasonable implementation of all suggestions made.

5-4.322 Category 2 Matters

Category 2 consists of cases in which there are actual or anticipated policy questions, peculiar appraisal problems, novel legal questions, or claimed compensation in excess of \$100,000. Category 2 cases will be the joint responsibility of the U.S. Attorneys' offices and the Department of Justice. The participation of the Land Acquisition Section may range from mere counsel and advice, on the one hand, to management of the case on the other, depending upon national interests. The provisions of USAM 5-1.324, supra, are applicable to Category 2 matters.

5-4.400 [RESERVED]

5-4.500 GENERAL PROCEDURES IN LAND ACQUISITION LITIGATION

5-4.510 General

The instructions herein set forth deal in broad terms with general procedures peculiar to condemnation litigation.

Examples of the various forms referred to in these instructions will be found in USAM 5-4.800, infra. Set forth in their entirety in USAM 5-4.900, infra are three Department of Justice publications designed primarily to assist federal agencies in preparing and assembling the materials which must accompany their requests to the Attorney General for the acquisition of land: 1) A Procedural Guide for the Acquisition of Real Property by Governmental Agencies, USAM 5-13.000, 2) Uniform Appraisal Standards for Federal Land Acquisitions, USAM 5-14.000, and 3) Standards for the Preparation of Title Evidence in Land Acquisition by the United States, USAM 5-15.000.

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5-4.511 Rule 71A, Federal Rules of Civil Procedure

Rule 71A of the Federal Rules of Civil Procedure governs the procedure to be followed in all cases for the condemnation of real and personal property under the power of eminent domain. All condemnation cases must be prosecuted in strict conformity with this Rule. Rule 71A provides that the general Federal Rules of Civil Procedure shall be applicable to all cases, except as otherwise provided in Rule 71A. There must be, therefore, strict conformity with the general rules, subject to the complaint, the form, content, and method of service of notice to defendants, and the form and content of the answer or appearance of defendants.

5-4.512 Declaration of Taking Act

The Declaration of Taking Act (see 40 U.S.C. §2548(a)(f)) authorizes the United States to acquire an interest in land immediately upon the filing of a declaration of taking with a court and the deposit in the court of the estimated compensation stated in the declaration.

U.S. Attorneys and field attorneys must comply promptly with instructions from the Department for filing of a declaration of taking and the deposit of estimated just compensation pursuant to the Declaration of Taking Act (see 40 U.S.C. §2548(a)(f)). Duplicate originals of a dated receipt of the clerk of the court for the amount deposited as estimated just compensation should be obtained and transmitted to the Department. A judgment on declaration of taking is not required unless specifically requested by the Department. The judgment, if obtained, should contain a finding by the court of the filing of the declaration of taking and the deposit of estimated compensation, the dates thereof, and an adjudication that title to the exact extent of the estate or interest described in the declaration is vested in the United States. The judgment should also contain an order for the surrender of possession if requested by the acquiring agency. Unnecessary recitations should be omitted from the judgment in accordance with Rule 54(a), Federal Rules of Civil Procedure. Service of copies of the judgment upon defendants is controlled by Rules 5 and 77(d), Federal Rules of Civil Procedure. The case must be prosecuted to a speedy conclusion in order to minimize the amount of interest which the government must pay on the amount of the ultimate award in excess of the deposit.

Under the Declaration of Taking Act and Rules 71A(c)(2) and (j), Federal Rules of Civil Procedure, the court may order that the monies deposited as estimated compensation, or any part thereof, shall be paid

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forthwith to the rightful claimant. The purpose of the Declaration of Taking Act is, first, to give the government title to and possession of the land and to relieve the government of the burden of interest accruing on the amount of the deposit, and second, and of equal importance, to make funds available for immediate distribution to the former owner in the discretion of the court.

In furtherance of this purpose and in accordance with Rule 71A(j), Federal Rules of Civil Procedure, U.S. Attorneys and field attorneys are required actively to assist landowners and the court, as amici curiae in effecting prompt distribution of funds deposited pursuant to the Declaration of Taking Act. Detailed instructions with respect to distribution are set forth in USAM 5-4.943, infra. No formal objection to the distribution by the court of all or any part of the deposit should be made without prior approval of the Department.

Immediately upon the filing of a declaration of taking and the deposit of estimated compensation, the landowner and other parties interested should be notified by letter, by the U.S. Attorney or field attorney, of the deposit and the amount thereof and that government counsel will render assistance in effecting advance distribution without prejudice to the right of the landowner to claim a larger amount. A form letter with which there should be substantial conformance is included at USAM 5-4.805, infra.

5-4.513 Local Practice

Practices in land acquisition cases vary from district to district, depending upon the rules and customs of the courts.

In several districts, local rules have been adopted which permit up to 15 tracts, economic units or ownerships, to be included in one declaration of taking, but require that for each such tract, economic unit or ownership, a separate civil action will be opened by the clerk of the court. These local rules generally follow the guidelines suggested by the United States Judicial Conference, as set out in USAM 5-4.911, infra. It should be noted that before this filing procedure can be utilized a local rule must be adopted by the court. Special forms of the complaint have been prepared to conform to the guidelines. See USAM 5-4.802 and 5-4.804, infra.

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5-4.514 Division Programs to Expedite Handling of Condemnation Cases

The Division has developed a program called the "Nine-Point Program for Settlement of Trial Within a Year" as a means of expediting the handling of condemnation cases. Details with respect to this program are set forth in USAM 5-4.912, infra. U.S. Attorneys are urged to become familiar with this program and to the fullest extent possible to process land acquisition cases in their districts in this methodical way.

The Division issued a memorandum dated June 6, 1980, to all U.S. Attorneys, announcing the Department of Justice policy favoring consent to trial of land condemnation cases by United States Magistrates in appropriate circumstances, as defined in 28 U.S.C. §50.11. The policy furthers the goals of the Federal Magistrates Act of 1979 (Pub. L. 96-82) and will also serve to expedite trial in appropriate circumstances. All attorneys in the U.S. Attorneys' offices are encouraged to seek the consent of parties to trials, either by a magistrate or by a jury presided over by a magistrate, in appropriate cases, and to ensure that parties in cases filed before October 10, 1979, are notified of their right to consent to the magistrates' exercise of litigation jurisdiction. For a detailed statement of the Division's policy in this regard, see USAM 5-4.913, infra.

5-4.515 Transmittal of Papers to the Land Acquisition Section

The Land Acquisition Section must be informed promptly by letter including the forwarding of all pleadings, where pertinent, of all major steps taken in each case, such as the completion of personal service of notice and of publication of notice, USAM 5-4.925 et seq., infra, the dates of all trials and hearings and the results thereof, and the filing by the U.S. Attorney and any defendant of a notice of appeal or a motion for new trial. It is essential that there be strict observance of the foregoing rule.

5-4.516 Transcripts of Record

The U.S. Attorney or field attorney shall transmit to the Land Acquisition Section, at the stages of the case hereinafter designated, successive partial transcripts which will be combined in the Department at the conclusion of the case into a complete transcript of record. No further or additional transcript is required and no documents included in one transcript need be duplicated in any subsequent transcript.

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A. Initial Transcript. Upon the institution of the case there shall be transmitted to the Department an initial transcript, which shall contain the following documents:

1. One certified and one conformed copy of the complaint (USAM 5-4.801 or 5-4.802, infra);
2. Two conformed copies of the notice of condemnation (USAM 5-4.804);
3. If a declaration of taking, USAM 5-4.804, infra, is filed, duplicate originals of the dated receipt of the clerk of the court for the moneys deposited as estimated compensation;
4. If a judgment is entered upon a declaration of taking or is an order of possession, USAM 5-4.827, infra, is obtained, one certified and one conformed copy of the judgment or order; and
5. One certified and one conformed copy of any order and two conformed copies of any other papers filed in connection with the institution of the case.

B. Intermediate Transcript. Upon the entry of any judgment determining just compensation (whether for one or more tracts in a case) there shall be transmitted to the Department an intermediate transcript consisting of:

1. One certified and three conformed copies of the judgment if the Department is to obtain the deficiency, or one certified and one uncertified copy of the deficiency judgment together with a copy of the letter of transmittal if the judgment has been transmitted with a request for payment to the local representative of the acquiring agency as authorized at USAM 5-4.582, infra;
2. One conformed copy of all papers of whatever nature filed in the case prior to and including the date of entry of the judgment (but excluding copies of papers included in transcripts previously transmitted to the Department and excluding orders of distribution);
3. Evidence of any lis pendens recorded among the local land records, see USAM 5-4.524;
4. The evidence of title, properly continued, see USAM 5-4.533, infra; and

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5. The certificate as to parties in possession and mechanics' liens. See USAM 5-4.536, infra.

When an intermediate transcript is transmitted to the Department, the U.S. Attorney or field attorney should state in the letter of transmittal that the transcript constitutes, or when combined with partial transcripts previously transmitted will constitute, a complete transcript of the record of the case to date. If there is no deficiency the intermediate transcript may be combined with the final transcript.

C. Final Transcript. At the conclusion of the proceedings, the Attorney General prepares an opinion directed to the acquiring agency. Therefore, upon the entry of a final judgment (whether for one or more tracts in the case) there shall be transmitted to the Department a final transcript consisting of:

1. One certified and one conformed copy of the final judgment, unless copies of the judgment were previously transmitted to the Department with the intermediate transcript;
2. Duplicate originals of the dated receipt of the clerk of the court for any moneys deposited pursuant to a judgment determining compensation;
3. The evidence of title, properly continued as provided in USAM 5-4.533, infra, unless needed for use in effecting distribution of just compensation, in which event the evidence of title should be transmitted to the Department upon the completion of distribution. The transmittal letter should indicate how any title objections noted in the title evidence have been eliminated or should have attached to it any curative data obtained to eliminate such objections;
4. Evidence of the disposition other than in the case of any outstanding compensable interests disclosed by the evidence of title;
5. All other related papers and curative data pertinent to the proceeding, such as affidavits, deeds, disclaimers, USAM 5-4.833, infra, releases, etc., unless other papers transmitted will indicate that the liens and other interests are barred by service of process on the necessary parties;
6. Evidence that complete distribution has been ordered of all funds which have been deposited in court by the government (however, transmittal of the papers enumerated above should not be deferred pending completion of this step); and

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7. If no declaration of taking was filed, one certified and one plain copy of the order vesting title should be forwarded to the Department.

5-4.517 Closing File

No case may be considered closed until:

- A. All funds have been ordered disbursed;
- B. All pending matters, such as motions for new trial or appeals, have been terminated;
- C. In use cases:
 - 1. The final term has expired, or the government's occupancy has otherwise terminated, and
 - 2. The question of restoration damages has been adjudicated or otherwise disposed of.

5-4.520 Institution of Action

5-4.521 Initial Documents Sent to U.S. Attorneys

U.S. Attorneys will be advised when they have been authorized by the Attorney General to acquire land on behalf of the federal agency. Accompanying the authorization to the U.S. Attorney to acquire the land will usually be the following documents:

- A. A copy of the government official's letter to the Attorney General requesting the institution of condemnation proceedings, and citing the authority for the taking;
- B. Where immediate title is required, a declaration of taking and one copy thereof, to which will be attached a description of the land to be acquired and a map showing the land;
- C. In cases where a declaration of taking is to be filed, a check for the estimated compensation, or instructions indicating how the check may be obtained; and

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D. Advice as to classification of the case and division of responsibility for the prosecution of the case between the U.S. Attorney and attorneys in the Land and Natural Resources Division. See USAM 5-4.300 et seq., supra.

On occasion the letter of transmittal may contain special instructions which will govern procedure if at variance with anything contained herein.

5-4.522 Preparing and Filing Complaints

Upon receiving the letter authorizing the initiation of an action to condemn land, the U.S. Attorney shall:

- A. Secure from the acquiring agency the materials described in USAM 5-4.921, infra;
- B. Prepare the documents described in USAM 5-4.922, infra; and
- C. File the complaint pursuant to the instructions in USAM 5-4.923, infra.

5-4.523 Land Subject to Options or Contracts of Sale by Acquiring Agency

When the land involved in a condemnation case is the subject of a valid accepted option or contract of sale, executed both by the presumptive owners and by a duly authorized representative of the acquiring agency prior to the institution of the condemnation case, the accepted option or contract is binding upon the signatories thereto in the condemnation case. The accepted option or contract should be pleaded in the complaint in condemnation. The U.S. Attorney or field representative is authorized without the prior approval of the Attorney General to have a judgment entered in the amount of the accepted option or contract provided that the local representative of the acquiring agency has advised in writing that the land has not decreased in value due to any action of the owners since the date of the option or contract, and all special and unusual conditions and requirements of the option or contract, if any, have been performed. It is also necessary that a determination shall have been made that the optionors in the accepted option or the vendors in the contract of sale are the sole and only parties entitled to the just compensation, other than taxing authorities, lienholders and encumbrancers whose claims may be satisfied from the award.

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The procedure for summary judgments under Rule 56, Federal Rules of Civil Procedure, should be utilized in obtaining the entry of consent judgments on options and contracts of sale, but only after the expiration of the time for filing of answers or appearance by defendants, see USAM 5-4.541 and 5-4.542, infra.

5-4.524 Lis Pendens

In connection with the institution of condemnation proceedings, a notice of the pendency of the action or lis pendens shall be filed or recorded among the proper local records, except in those jurisdictions where the law is settled that the commencement of the action is notice to all persons affected. If more than one county is involved, a separate notice is necessary for each county.

The steps necessary for the commencement of lis pendens notice are determined by the law of the particular state. Some states follow the common law, which is that notice commences upon the mere filing of the complaint. Some common law states, however, have the additional requirement that the defendants must be served with process before notice will commence. In other states the common law has been superseded by statute and the filing of a prescribed form of notice of lis pendens is necessary to commence notice. And where, under local law, either a declaration of taking or a judgment on declaration of taking is entitled to be recorded and is deemed to give notice, the recording thereof would constitute notice. In no instance should both a lis pendens notice and a judgment on declaration of taking be recorded.

5-4.525 Service

Service of the notice of condemnation must be made in accordance with Rules 4(c) and (d), Federal Rules of Civil Procedure. A copy of the complaint need not be served with the notice of condemnation.

The Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178), as amended, is in full force and effect and is applicable to condemnation cases. The U.S. Attorney or field attorney must investigate to determine whether any defendant who has not answered or filed an appearance is in military service with the Armed Forces or is in public Health Service on duty with the Armed Forces. The U.S. Attorney or field attorney must comply strictly with the provisions of the Act (50 U.S.C., App. 520) by filing necessary affidavits and moving for the appointment of an attorney ad litem, when required.

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Complete instructions with respect to service are set forth in USAM 5-4.925, infra.

5-4.526 Possession

Where a declaration of taking has been filed, U.S. Attorneys and field attorneys must comply with instructions from the Department requiring the entry of an order for the surrender of possession of property to the government. See USAM 5-4.827, infra. Unless the property is vacant the acquiring agency should be requested to advise that the necessary 90 days' written notice has been given of the date by which possession is required if any person lawfully occupying the property shall be required to move from a dwelling or to move his/her business or farm operation, as required by Section 301(5) of Public Law 91-646, approved January 2, 1971, 84 Stat. 1905. Notice of the entry of the order, see USAM 5-4.827, infra, and of the date provided therein for the surrender of possession are controlled by Rules 5 and 77(d), Federal Rules of Civil Procedure. Service of a copy of the order should be made upon the person in possession of the land in accordance with Rule 5(b), Federal Rules of Civil Procedure, or service should be made in the manner and within the time directed by the court in the order.

If the party in possession refuses to surrender possession as provided in the order, application should be made, in accordance with Rule 70, Federal Rules of Civil Procedure, for a writ of assistance to put the government in possession. Application for a citation in contempt under Rule 70 should not be made without the prior approval of the Department.

5-4.530 Title Evidence

5-4.531 Purpose

Rule 71A(c), Federal Rules of Civil Procedure, provides that there shall be named defendants in condemnation cases all persons having or claiming an interest in the property condemned whose names can be ascertained by a reasonably diligent search of the local land records, considering the character and value of the property involved and the interest or estate to be acquired. Persons having an interest in property include those owning an estate in the land (e.g., fee owner, lessee, tenant) and those having a lien or encumbrance on the land (e.g., mortgagee, taxing authority, material person, mechanic). Evidence of title must, therefore, be obtained and examined for a determination of the

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necessary and proper parties defendant. Persons having (or claiming) an interest in the property at the time of the commencement of lis pendens notice, see 5-4.524, infra, are necessary parties and must be joined in the action as defendants. By joining as defendants all persons disclosed by the title evidence as having a possible interest in the property as of the commencement of lis pendens notice, and, in the course of proceedings, by giving those parties notice and opportunity to be heard at the trial or hearing on just compensation, due process will have been afforded and the final judgment will be res judicata as to those parties. If the United States secures a judgment of condemnation fixing compensation and ordering distribution to the wrong person or to fewer than all persons entitled thereto, the party having a compensable interest who was omitted from the proceedings has been denied due process and is entitled to bring an action against the United States for just compensation. The United States may thus be compelled to pay twice for the same acquisition. Where the interest of the omitted party was a matter of record but was not disclosed by the title evidence, the United States may recover its loss from the title company or abstractor up to the limit of liability. See USAM 5-4.534, infra.

5-4.532 Title Evidence Usually Supplied by Acquiring Agency

In condemnation proceedings the necessary evidence of title is made available to the Department by the acquiring agency. In compliance with applicable standards, title evidence conforming to the requirements of the Department should be obtained from approved abstractors or title companies. Contracts for the title evidence should include as a separate item the costs of any necessary continuation of the evidence of title.

5-4.533 Continuation of Title Evidence

The evidence of title must be continued to a date subsequent to the recordation of the lis pendens, declaration of taking or of the judgment on the declaration of taking. On the basis of information, if any, disclosed by the continuation of the evidence of title, and the certificate of inspection and possession, USAM 5-4.536, infra, any additional parties shown by the continuation to have, or who may claim to have, any interest in the property involved must be joined as defendants in the case, and any changes in the naming of necessary and proper parties defendant must be effected. The procedure for adding, dropping, or substituting parties is by motion and order under Rules 21 and 71A(g) and (i)(3), Federal Rules of Civil Procedure. An amended complaint need not be filed. Detailed instructions with respect to continuing title evidence are set forth in USAM 5-4.924, infra.

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5-3.534 Title Company Liability

Title evidence, in addition to being properly continued, must also comply with the Department's requirements with respect to the limitation of the title company's liability.

Generally, certificates of title, USAM 5-4.832, infra, and title insurance policies shall not limit the liability of the title company to a sum less than 50% of the reasonable value of the property. As to acquisitions valued at more than \$50,000, the limitation of liability of the issuing title company under the certificate of title or title insurance policy may be limited to 50% of the first \$50,000 and 25% of that portion of the value in excess of that amount.

The "reasonable value of the property," in the context of condemnation proceeding, is the amount awarded as just compensation in the judgment. Where the title company has limited its liability to a sum substantially less than that permitted, an endorsement to the certificate or policy must be obtained from the title company providing for an acceptable amount of coverage. (Reasonable compliance with the requirements as to the percentage limitation of liability is all that is required.)

Recitations in the title evidence that the limitation of liability is "as per agreement," "to be agreed upon," or the like, are unsatisfactory. In such instances it will be necessary to obtain an endorsement providing adequate coverage in a stated dollar amount. Title evidence that does not state dollar amount of coverage, but states that coverage is in "the amount of the award" or a stated percentage (not less than permitted) of the award, is acceptable.

5-4.535 Certification of Ownership

It is essential that the title evidence disclose the names of the persons in whom title was vested at the time of commencement of notice. See USAM 5-4.531, supra. This should present no problem in cases instituted by complaint only.

In cases in which a declaration of taking has been filed and either the declaration itself or a judgment thereon has been recorded, the continued evidence of title typically recites that title to the property as of the effective date thereof is vested in the United States of America, followed by an appropriate reference to the recordation of the

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declaration or judgment. However, such a recitation must also be accompanied by a statement that prior to the filing for record of the declaration or judgment, as the case may be, title was vested in a named person or persons. An example of a satisfactory endorsement is given below:

ENDORSEMENT

Attached to Policy No. 87654

Issued by

URBAN TITLE INSURANCE COMPANY

Schedule of A of the above policy is hereby amended in the following particulars:

Paragraph 2 of Schedule A is hereby deleted and the following is substituted:

2. Title to the estate or interest covered by this policy at the date hereof is vested in the UNITED STATES OF AMERICA by judgment upon declaration of taking recorded January 15, 1973, Book 312, Page 923, Deed Records of Benton County, Missouri. Prior to filing said judgment, title was vested in John Smith and Mary Smith, his wife.

Without such a certification by the title company as to prior ownership, it cannot be ascertained whether the person from whom the property has been taken by the condemnation proceeding has been made a defendant in the action. Insurance that is vested in the United States by declaration of taking or judgment thereon recorded on a given date is no protection against the loss that might result in the event that the prior owner was not joined in the action and subsequently recovers compensation from the United States in a separate proceeding.

5-4.536 Certificates as to Parties in Possession and Mechanics' Liens

In order to insure the joinder as defendants in the condemnation cases of all parties who have, or who may claim to have, any right or interest in the property involved, whether or not such right or interest

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is disclosed by the evidence of title, the U.S. Attorney or field attorney should obtain a certificate showing (a) whether any party is in actual or constructive possession of all or any part of the land whose rights, if any, are not a matter of record, and (b) whether within the period provided by local law there has been any work or labor performed upon the property or any material furnished in connection with any work upon the property which would entitle anyone to a lien. Generally, the necessary certificate of inspection may be obtained from the local representative of the acquiring agency or the custodian for the government of the property. The certificate should conform substantially with that set out at USAM 5-4.831, infra. All or any number of the tracts or parcels of land in a particular case may be included in one certificate of inspection, if more convenient than using a separate certificate for each tract.

All parties disclosed by the certificate as to possession and mechanics' liens to have an interest in the property involved must be joined as defendants in the case as provided at USAM 5-4.531, supra.

When submitting a final transcript, USAM 5-4.516, supra, to the Department, the title evidence is incomplete unless it includes a certificate of parties in possession and mechanics' liens.

5-4.537 Final Title Evidence

The final evidence submitted to the Department in the final transcript must satisfy the following requirements:

A. The abstract must be continued to the date of commencement of lis pendens or other notice, USAM 5-4.524, supra;

B. A supplemental certificate or continuation title report, binder, or endorsement based on a search of the records to the date of commencement of lis pendens or other notice must be obtained. No final certificate or policy is required provided the preliminary certificate, report, or binder does not improperly limit the title company's liability, USAM 5-4.534, supra, or the company assumes the required financial liability and the certificate, report, or binder contains no provision under which the issuing company denies liability for losses if the final certificate or policy is not issued.

5-4.538 Curative Materials

When transmitting title evidence to the Department as part of a final transcript of record, there should be included evidence of the

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disposition of any outstanding compensable interests disclosed by the evidence of title which interests are not barred by the condemnation proceedings. For example, an official receipt for the payment of ad valorem taxes should accompany title evidence disclosing unpaid taxes which were a lien on property on the date of taking.

5-4.540 Objections to Taking; Alterations in Estate Taken

5-4.541 Answer of Defendant

If a defendant wishes to raise an objection to the taking, he/she must answer within 20 days from receipt of notice, USAM 5-4.804, infra, unless the time is extended. If a defendant files any pleading alleging failure to comply with the requirements of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. §4321, U.S. Attorneys should immediately submit to the Department duplicate copies of such pleadings, together with available information as to compliance with this Act by the acquiring agency. Detailed instructions with respect to responding to a challenge to the taking are set forth in USAM 5-4.931, infra.

5-4.542 Notice of Appearance

If a defendant merely wishes to appear in the cause to assure notice of any future action to be taken therein, the U.S. Attorney or field attorney may suggest that he/she file a notice of appearance.

5-4.543 Alteration of Estate Sought to Be Condemned

It may occasionally be to the advantage of all concerned to modify or change the estate being condemned. The Department should be informed promptly of any suggestions which either the U.S. Attorney or the property owners may have concerning modification, alteration, or change of the estate or description of the property to be condemned, but no alternation of the pleadings should be made except upon receipt of appropriate authorization from the Department.

5-4.544 Exclusion of Property Acquired by Declaration of Taking

The Attorney General is authorized in any condemnation case to stipulate on behalf of the United States to exclude any property or any

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part thereof or interest therein which may have been taken by the United States by declaration of taking (40 U.S.C. §258(f)). See USAM 5-4.512, supra. The necessity for the exclusion of property acquired by taking generally occurs in two classes of cases:

A. Where the estate taken is not the estate wanted. In cases in which through inadvertence or otherwise title has been taken to property or some portion thereof or an estate or interest therein not desired by the acquiring agency or found subsequently not to be needed for public use, U.S. Attorneys and field attorneys must obtain the prior authorization of the Department for the exclusion of property.

B. Where a former landowner wishes to remove property not needed by government. In cases in which the landowner desires to remove buildings, trees and shrubs, crops, or fixtures attached to the realty which are not needed or desired by the government, U.S. Attorneys and field attorneys are authorized to enter into stipulations for the exclusion of property without securing the approval of the Department provided that the exclusion has been approved by the local representative of the acquiring agency. However, if the property is of high value, the specific approval of the Department should be obtained.

5-4.545 Stipulation of Exclusion

The authority of U.S. Attorneys and field attorneys to enter into stipulations is governed by the nature of the property to be excluded (see USAM 5-4.544, supra), but in the event of any question, specific instructions should be obtained from the Department. Detailed instructions with respect to the exclusion or dismissal of land from proceedings are set forth in USAM 5-4.932, infra.

In all cases in which a stipulation is entered into for the exclusion of property, the stipulation must contain either a provision fixing the amount by which the just compensation, whether already determined or to be determined, shall be reduced by reason of the exclusion, or a provision to the effect that no claim of whatever nature for just compensation will be asserted in the case or otherwise for the property excluded. If, in the opinion of the acquiring agency, the property to be excluded is of no value or the exclusion will result in a savings to the government by the avoidance of demolition or removal costs, the provisions of this paragraph shall not apply.

A stipulation relating to the removal of property not needed by the government, see USAM 5-4.544, supra, should also contain a provision

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limiting the time for removal by the owner of the property and providing that if the owner fails to remove the property within the prescribed time, the stipulation shall be of no force and effect.

5-4.546 Termination of Temporary Use Cases

Upon receipt of instruction from the Department that the temporary use of property is no longer necessary, the U.S. Attorney or field attorney should promptly file a motion for the limitation of the term condemned to the date of termination of the temporary use and the surrender of possession of the property by the government. Service of the motion and notice should be made in accordance with Rule 5(b), Federal Rules of Civil Procedure. Proper arrangements should be made promptly for a determination of the extent, if any, of the monetary liability of the government for payment of just compensation by reason of any physical changes of the property resulting solely from the government's use. Generally, there should be obtained an estimate of the cost of physical restoration, with proper allowance for salvage, and an appraisal reflecting the diminution or enhancement in the fair market value of the property as of the date of termination of the temporary use resulting directly and exclusively from physical changes made by the government.

An appropriate order of termination should be entered covering restoration damages, if any, or finding no further liability on behalf of the government (one certified and one plain copy of such order should be forwarded to the Department) or the case should be set for trial at the earliest practicable date for the adjudication of all claims of the defendants for restoration.

5-4.550 Determination and Payment of Just Compensation

5-4.551 Right to Trial by Jury or Commission

Rule 71(h), Federal Rules of Civil Procedure, provides that any party to a condemnation case may have a trial by a jury on the issue of just compensation by filing a demand therefor unless the court in its discretion orders that, because of the character, location or quantity of the properties to be condemned, or for other reasons in the interest of justice, the issue of just compensation should be determined by a commission of three persons appointed by the court. The rule further provides that trial of all issues shall otherwise be by the court.

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In order to preserve the right to a trial by a jury or commission, a demand for a jury trial should be filed in all major tract cases and in any other cases when by reason of special circumstances the Department requests such demand or the U.S. Attorney determines that it is in the interest of the United States that a jury trial should be demanded. Major tracts include all tracts involving deposits of estimated compensation of \$150,000 or more and other tracts involving claims for compensation in such amounts and tracts in which significant and complex legal problems may be decided. (See Tab W, "I Condemnation Seminar 1962" and USAM 5-4.865.) Under Rule 38(b), Federal Rules of Civil Procedure, a demand for a jury trial may be endorsed upon a pleading. In the cases referred to above, the demand for a trial by jury should be endorsed upon the complaint in condemnation, USAM 5-4.801 or 5-4.802, infra, and notice of the demand should be included in the notice of condemnation. See USAM 5-4.804, infra.

As to all pending cases except those in the major-tract program, U.S. Attorneys are authorized to waive jury trials if, in their discretion, it is in the interest of the United States to do so, except when contrary instructions are issued by the Department as to a particular case. Juries will be waived in cases in the major-tract program only upon instructions from, or with the prior consent of, the Department.

If it is subsequently determined that the use of a commission is advisable, a motion should be made for the appointment of the commission. The motion should set forth the facts justifying the use of the commission. The order of court appointing the commission should include a finding of fact by the court as to the necessity for use of the commission. Instructions with respect to trial settings, or a hearing before a commission, are set forth in USAM 5-4.941, infra.

5-4.552 Retaining Independent Appraisers

Should a U.S. Attorney find it necessary to retain the services of an independent appraiser, he/she should, before engaging the appraiser's services, submit to the Department a Form OBD 47, together with executed Form USA-157 and, when the appraiser's fee is over \$2,500, Form LN-116. Instructions with respect to engaging an appraiser are set forth in USAM 5-4.942, infra.

5-4.553 Disbursement of Funds Deposited in Court

U.S. Attorneys and field attorneys are required to actively assist landowners and the court, as amicus curiae, in effecting prompt distribution of funds deposited into the registry of the court as just

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compensation. Duplicate conformed copies of all orders of distribution, see USAM 5-4.815 or 5-4.824, infra, should be promptly transmitted to the Department. Rule 71(j), Federal Rules of Civil Procedure, which relates to distribution, provides that the court and attorneys shall expedite the proceedings for distribution and for the ascertainment and payment of just compensation in cases in which a deposit is made. Government counsel should obtain promptly and furnish to the court all information available as to the state of the title to the property and any liens, taxes, and encumbrances thereon. Government counsel should also assist landowners in the preparation of motions for, and orders of, distribution, see USAM 5-4.815 and 5-4.824, infra, and affidavits for execution by the claimants in support of motions for distribution. Care should be taken to see that a proper order is entered for the payment of all taxes and assessments due and exigible at the time of vesting of title in the United States. Unless serious doubt exists as to the real ownership of the property, government counsel should not delay distribution of just compensation for any extended period for the procurement of curative material for the elimination of defects of title but should rely upon the condemnation procedure for that purpose. Instructions with respect to procedures in disbursing funds deposited in court are set forth in USAM 5-4.943, infra.

5-4.554 Refund of Excess Funds Deposited

After a deposit has been made to the registry of the court and it becomes necessary to have a part or all of it returned to the government (because of an abandonment of the case or an overdeposit of estimated compensation), the check representing such refund must be made payable to the Treasurer of the United States and forwarded to the Department for distribution to the proper agencies.

5-4.555 Refund of Balance When Owner Not Locatable

When funds cannot be disbursed because the owner cannot be located, or for other reasons, an order should be sought, as promptly as the court will entertain such orders, for the refund of the undistributed balance to the Treasury of the United States pursuant to 28 U.S.C. §2042. Action pursuant to this section becomes a ministerial duty of the clerk of the court, although copies of the order directing the transfer of funds should be furnished the Department, the clerk of the court will assume the responsibility for the actual transfer of funds pursuant to the court order. In the event a subsequent order is entered for a redeposit of the money for the purposes of withdrawal, it will be the duty of the clerk of the court to submit the court's order directly to the audit section of the Administrative Office of the United States Courts for processing with

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the Treasury Department. A copy of this order should also be sent to the Department so that the records of the case will be complete. Although the U.S. Attorneys should assist the landowners in filing the motion to redeposit the funds and advise the court with reference thereto, no further action thereon by either the U.S. Attorney or the Department will be required to obtain the redeposit.

5-4.556 Reimbursement in Certain Cases for Moving, Relocation and Related Expenses

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, approved January 2, 1971, 84 Stat. 1894, requires the payment by acquiring agencies of moving, replacement, relocation and related expenses of property owners and for certain expenses incidental to the transfer of title to the United States, including reimbursement to the owner for the pro-rata portion of real property taxes paid which are allocable to the period subsequent to the date of vesting title in the United States or the effective date of possession of such real property by the United States, whichever is earlier. Section 102(a) of this Act provides as follows:

The provisions of section 301 of title III of this Act create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.

And, Section 102(b) provides as follows:

Nothing in this Act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to the date of enactment of this Act.

Representatives of acquiring agencies have been distributed to coordinate their activities under the authorizing statute with representatives of the Department of Justice to insure that no duplication of payment will result.

All inquiries by owners or tenants with respect to reimbursements under this statute should be referred to the local representative of the acquiring agency. No changes in existing practices and procedures in handling condemnation cases and particularly in negotiating for settlements in condemnation cases are required by this authorizing

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statute. However, U.S. Attorneys and field attorneys should advise the local representatives of the acquiring agency of any case in which an owner or tenant asserts a claim for expenses and other loss and damage alleged to have been incurred by such owner or tenant as a result of the moving of themselves, their families and possessions because of the acquisition of the land. This requirement for notice to representatives of the acquiring agency is particularly applicable in cases for the condemnation of the temporary use of property wherein claims may be asserted for moving costs under the rule established in General Motors Corporation v. United States, 323 U.S. 373 (1945).

5-4.560 Post-Trial Motions

5-4.561 Notification to Division of Awards

Immediately after hearing or trial, send executed Form LN-18, USAM 5-4.866, infra, in triplicate, together with a detailed report of the trial or hearing to the Division with specific recommendations for future action.

5-4.562 Motions for New Trial; Objections to Commission's Awards

The usual course of action, when awards materially exceed the government's testimony, is to move for a new trial, where the award was made by a jury, or to object to the award made by a commission. Where at all possible, motions for new trials and objections to a commission's award should not be filed without the prior approval of the Land Acquisition Section. Procedures for the U.S. Attorneys to follow with respect to motions for new trials and objections to a commission's award are set forth in USAM 5-4.944, infra.

5-4.570 [RESERVED]

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5-4.580 Judgments

The U.S. Attorney or field attorney should take care that judgments in condemnation cases include an adjudication of all issues within the jurisdiction of the court. Separate judgments on the several issues in the case should be avoided whenever possible, thus, for example, an order of distribution should be included in a judgment determining compensation. Judgments should not contain recitals of pleadings, reports of commissions or the record of prior proceedings. See USAM 5-4.824, infra, for form of judgment.

5-4.581 Contents of Judgment

Judgments determining compensation should contain:

A. A finding and adjudication of the right of the United States to condemn the property involved for public use;

B. An adjudication that title to the exact estate or interest condemned is vested in the United States if the declaration of taking procedure has been used, or, if not, an adjudication that title to the exact estate or interest will vest in the United States upon payment of the just compensation into the registry of the court and an order vesting title should be entered;

C. Confirmation of the stipulation between the government and the landowners fixing the amount of just compensation or confirmation of the verdict of the jury or the award of a commission appointed by the court to determine compensation;

D. An accurate legal description of the property, which may be referenced to the complaint or declaration of taking;

E. Whenever possible, a finding and adjudication of the right of the defendants to distribution of the just compensation;

F. Provision for the payment of interest, if any, for which the government may be legally liable;

G. Provision for any refund of money deposited into the registry of the court to which the government may be entitled; and

H. An adjudication of any other issue not previously ruled upon formally by the court.

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5-4.582 Satisfaction of Deficiency Judgments

Upon the entry of judgments fixing compensation and ordering the deposit of deficiencies, the U.S. Attorney shall request the Department to secure a check for the necessary amount, except in cases where the acquiring agency is the Department of the Interior, the Departments of the Navy, Army or Air Force, the General Services Administration, the Nuclear Regulatory Commission or the National Aeronautics and Space Administration, in which case the request for the amount of deficiency is sent to a local representative of the acquiring agency. Instructions for securing deficiency checks are set forth in USAM 5-4.945, infra.

5-4.590 Appeals

5-4.591 Recommendation With Respect to Appeals

In any case where he/she believes substantial error has been committed, the U.S. Attorney shall immediately advise the Land Acquisition Section and give his/her recommendations regarding appeal.

5-4.592 Procedure in Recommending Appeal

If a U.S. Attorney wishes to recommend that a judgment be appealed, he/she should:

A. Send one certified and one plain copy of the order of the court to the Department.

B. Prepare a recommendation including a statement of the factual and legal issues involved, the rulings of the court which may be grounds for an appeal, the reasons for his/her recommendations and the approximate cost of a transcript of the testimony. The date from which the time for appeal runs should also be stated.

C. Unless otherwise instructed, file a protective notice of appeal just prior to the expiration of the time within which such notice may be filed, but not before then. This is to allow the Department the benefit of the full period of time for appeal to study the case and reach a decision. Two copies of the notice of appeal should be forwarded to the Land Acquisition Section immediately after filing.

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The Department will advise the U.S. Attorney whether to order the transcript of testimony. Note the instructions at USAM 5-8.000, infra, and in USAM Title 2, regarding the handling of appeals.

5-4.600 SETTLEMENT AND DISMISSAL OF CASES

5-4.610 General

Except as set forth in USAM 5-4.620, infra, no case under the jurisdiction of the Land Acquisition Section may be settled or dismissed without specific or delegated authority from the Attorney General.

5-4.611 Partial Settlements

Overall settlements for all interest in a tract in a pending condemnation proceeding are much to be preferred over separate settlements for partial interests. Offers not including all interests in a tract will be approved only in exceptional cases and should be explained and justified fully.

5-4.620 Settlement Procedures

Negotiations for compromise settlement always should be attempted, and should be undertaken by the U.S. Attorney with the cooperation of the local office of the acquiring agency. Negotiations should be initiated or entered into only after the appraisals have been thoroughly examined and found to be sound. If evaluations vary greatly, then consultations with appraisers first should be had to clarify or correct any possible misapplication of the facts or legal principles involved. If the appraisals are not satisfactory, or vary greatly, the U.S. Attorney should request authority to engage additional appraisers, see USAM 5-4.942, supra.

Settlement should never be sought for statistical purposes. Where settlement negotiations lead to an offer in any case that is deemed by the condemnation attorney to be a reasonable reflection of fair market value, in light of the pertinent appraisal reports, the risks and costs of trial and the effect of the settlement upon other pending cases, he/she is encouraged to consummate the settlement with dispatch, if it is within his/her authority to do so, (see USAM 5-4.630, infra), or to furnish the settlement offer to the Department for approval (see USAM 5-4.640, infra).

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Detailed procedures with respect to settlements are set forth in USAM 5-4.952, infra.

5-4.630 Authority of United States Attorneys to Settle Condemnation Cases

On June 12, 1978, by Land and Natural Resources Division Directive No. 11-78, the U.S. Attorneys were authorized, subject to the limitations imposed in USAM 5-4.631, infra, to accept or reject offers in compromise, without the prior approval of the Land and Natural Resources Division, of claims against the United States for just compensation in condemnation proceedings in any case in which:

A. The gross amount of the proposed settlement does not exceed \$200,000;

B. The settlement is approved in writing (the written approval to be retained in the file of the U.S. Attorney concerned) by the authorized field representative of the acquiring agency if the amount of the settlement exceeds the amount deposited with the declaration of taking as to the particular tract of land involved;

C. The amount of the settlement is compatible with the sound appraisal, or appraisals, upon which the United States would rely as evidence in the event of trial, due regard being had for probable minimum trial costs and risks; and

D. The case does not involve the revestment of any land or improvements or any interest, or interests, in land under the Act of October 21, 1942, 56 Stat. 797 (40 U.S.C. §258f).

5-4.631 Limitations on Delegations

The U.S. Attorney's authority to settle land acquisition cases may not be exercised when:

A. For any reason, the compromise of a particular claim, as a practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated above;

B. Because a novel question of law or a question of policy is presented, or for any other reason, the offer should, in the opinion of the officer or employee concerned, receive the personal attention of the

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Assistant Attorney General in charge of the Land and Natural Resources Division; or

C. The agency or agencies involved are opposed to the proposed closing or dismissal of a case, or acceptance or rejection of the offer in compromise.

If any of the conditions listed above exist, the matter shall be submitted for resolution to the Assistant Attorney General in charge of the Land and Natural Resources Division.

5-4.632 Authority of Agency Representatives to Recommend Acceptance or Rejection of Settlement Offers

In Department of the Army acquisitions, the District Engineers have authority to recommend on behalf of their Department the approval or rejection of settlements involving payments of \$40,000 or less, or for greater amounts which are not in excess of the fair market value of the land involved as determined by Department of the Army appraisers. In submitting offers in compromise which require the payment of sums in excess of the authority of the District Engineers in cases for the condemnation of land at the request of the Department of the Army, the U.S. Attorney or field attorney should urge the District Engineer promptly to submit his/her recommendation for acceptance or rejection of the offer to the Office of the Chief of Engineers whose views will be requested by the Department.

The Naval Facilities Engineering Command of the Department of the Navy has authorized its Field Divisions to approve or reject on its behalf proposed settlements or claims not in excess of 10 percent above the deposit in all cases in which the deposit does not exceed \$250,000. As to settlement offers involving payments in excess of 10 percent above the deposit and in cases wherein the deposit exceeds \$250,000, the U.S. Attorney should urge the local Field Division promptly to forward its recommendation to: Commander, Naval Facilities Engineering Command, Department of the Navy, Washington, D.C. (Attention: Office of Counsel), whose recommendation will be sought by the Department.

The Regional Commissioners of the General Services Administration have authority to recommend on behalf of their Administration the approval or rejection of any settlement offer.

Regional Solicitors of the Department of the Interior have authority to recommend approval or rejection of settlements involving payments of

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\$500,000 or less. In submitting offers in compromise in excess of \$500,000 the U.S. Attorney should, in Department of the Interior cases, request the Regional Solicitor to forward his/her recommendation to the appropriate officer in his/her agency whose recommendation will be sought by the Department.

The authority of the above-mentioned field representatives does not relate to settlements which involve the revestment of the title to portions of the lands acquired or interest therein. The field representatives should submit their recommendations as to such offers in the same manner as in settlements involving payment in excess of their delegated authority.

5-4.640 Transmittal of Compromise Offer to Land Acquisition Section; Recommendations with Respect to Acceptance

Every offer of compromise in a condemnation case, with the exception of those offers within the authority of the U.S. Attorney to accept or reject (see USAM 5-4.630, *supra*), which the U.S. Attorney considers may be recommended for acceptance must be submitted to the Department for consideration and acceptance or rejection. The U.S. Attorney or field attorney shall submit with the offer in compromise:

- A. His/her recommendation;
- B. The range of the government's proposed testimony of value in event of trial;
- C. The probable range of testimony on behalf of the landowner insofar as known;
- D. All available appraisal reports; and
- E. A statement of all other factors pertinent to a determination of the advisability of accepting or rejecting the proposed settlement.

Whenever feasible, the Department should be advised of the recommendation of the local representative of the acquiring agency with respect to the proposed settlement. This recommendation and information should be submitted in triplicate using Form No. OBD 43 (see USAM 5-4.867), which forms may be obtained from the Department. See USAM 5-4.826, *infra*, for suggested forms of stipulation and judgment thereon. The forms for offers involving the revestment of property under 40 U.S.C. §258f (see USAM 5-4.812, *infra*) must include the appraisals of the

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property to be revested and the appraised value of the interest to be retained by the United States.

5-4.650 Dismissal or Abandonment of Condemnation Case

Condemnation cases must not be dismissed as to any of the land included in the instructions to condemn, nor may there be any change as to the interest or estate to be acquired, unless expressly authorized by the Department. (See USAM 5-4.543 and 5-4.544, supra.) Orders of dismissal must be entered without prejudice. In the absence of a stipulation with the property owner in which he/she waives the right to costs, the federal court may award to the owner of any right, title or interest in such real property such sum as will in the opinion of the court reimburse such owner for his/her reasonable costs, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceeding, if the proceeding is abandoned by the United States. See Section 304(a), Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, approved January 2, 1971, 84 Stat. 1906 (see USAM 5-3.558). The procedure for dismissal is set forth in Rule 71A(i), Federal Rules of Civil procedure. Instructions for the termination of cases instituted to acquire the temporary use of property are set forth at USAM 5-4.546, supra. See USAM 5-4.813, infra for forms of stipulation and order.

5-4.700 [RESERVED]

5-4.800 SAMPLE PLEADINGS, ORDERS AND FORMS

When using these forms as models, typewritten pleadings should be double spaced.

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8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff, and such persons are made parties to the action under the designation "Unknown Owners."

WHEREFORE, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Trial by jury of the issue of just compensation is demanded by plaintiff. */

UNITED STATES OF AMERICA

BY:

United States Attorney

*/ Jury trial is not requested in tracts worth less than \$4,000; an additional paragraph is necessary if option contracts are to be enforced.

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5-4.802 Complaint in Condemnation for Use in Districts Which Have Adopted
the Judicial Conference Guidelines

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF _____

UNITED STATES OF AMERICA,)
)
Plaintiff,)
) CIVIL NO. _____
v.)
) TRACT NO. _____
_____)
)
Defendants.)

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America for the taking of property, under its power of eminent domain, and for the ascertainment and award of just compensation to the parties in interest.

2. The uses for which the property is to be taken and the authority for the taking are set forth in Schedule "A" annexed hereto and made a part hereof.

3. The property to be taken, the estates to be taken and the names and addresses of the persons having or claiming an interest in said property are described in Schedule "B" annexed hereto and made a part hereof.

4. Local and state taxing authorities may have or claim an interest in the property by reason of taxes and assessments due and exigible.

5. There are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to plaintiff, and such persons are made parties to this action under the designation "Unknown Owners."

Wherefore plaintiff demands judgment that the property be condemned, and that just compensation for the taking be ascertained and awarded, and such other relief as may be lawful and proper.

UNITED STATES OF AMERICA

UNITED STATES ATTORNEY

Assistant United States Attorney

N.B. Modification is necessary if option contracts are to be enforced or if trial by jury is desired.

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5-4.803 Amended Complaint

(Caption as in Complaint)

AMENDED COMPLAINT IN CONDEMNATION AS TO TRACT(S)
NO(S). (ADDING PARTIES)

Plaintiff, United States of America, files this its Amended Complaint in Condemnation, which amendment applies only to that land in this proceeding designated in the original Complaint filed in this cause on the _____ day of _____, 19__, as Tract(s) No(s). _____, and should show the Court:

1. By authority of the _____ and the Attorney General of the United States the above-mentioned land was included in these proceedings in condemnation, and from the best information obtainable it has been determined that the following named persons are necessary parties defendant herein as to the respective tracts of land set out opposite their names below:

2. The original Complaint filed in this cause contains a description of said tract(s) of land.

3. Plaintiff adopts in full the allegations contained in its original Complaint herein, as fully and completely as though the same were again set forth in this Amended Complaint.

Wherefore, plaintiff prays as in its original Complaint, and in addition thereto prays as follows: That the persons hereinabove named be made parties defendants herein; that the just compensation for the taking of said tract(s) of land be ascertained; that the respective interests of said defendants and their right to receive a portion of the compensation awarded herein be ascertained and established; that the amount finally determined to be due said defendants as just compensation for the taking of said land be paid to them in the respective proportions found to be due them.

United States Attorney

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5-4.804 Notice of Condemnation

(Caption as in Complaint)

NOTICE

TO: All those persons named in Exhibit "C"
attached hereto and made a part hereof.

You are hereby notified that a complaint in condemnation has heretofore been filed in the office of the Clerk of the above-named Court in an action to condemn an interest in and to the property described in _____ attached hereto and made a part hereof for the public use _____.

The estate hereby taken for said public use as aforesaid is set forth in _____ attached hereto and made a part hereof.

The authority for the taking is set forth in _____ attached hereto and made a part hereof.

You are further notified that if you have any objection or defense to the taking of the property in which you may have or claim some interest you are required to serve upon plaintiff's attorney at the address herein designated within twenty (20) days after personal service of this notice upon you, exclusive of the date of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed and stating all your objections and defenses to the taking of the property. A failure so to serve an answer shall constitute a consent to the taking and to the authority of the court to proceed to hear the action and to fix the just compensation and shall constitute a waiver of all defenses and objections not so presented.

You are further notified that if you have no objection or defense to the taking you may serve upon plaintiff's attorney a notice of appearance designating the property in which you claim to be interested and thereafter you shall receive notice of all proceedings affecting the said property.

You are further notified that at the trial of the issue of just compensation, whether or not you have answered or served a notice of appearance, you may present evidence as to the amount of the compensation to be paid for the property in which you have an interest and you may share in the distribution of the award of compensation.

UNITED STATES OF AMERICA

BY _____
United States Attorney

N.B. Additions may be made to give notice of jury request and requests to enforce options.

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5-4.805 Letter Advising Landowners of Filing of Action and Deposit of Funds

Re: Civil Action No.: _____
Tract No(s): _____
Amount deposited as estimated just
compensation: \$ _____
Project: _____

The United States heretofore has filed a condemnation suit to acquire an interest in certain land owned by you, designated by tract number(s) as above, and has deposited in the registry of the United States District Court, as estimated just compensation, the sum of money indicated above.

This estimated compensation is based upon appraisals made by competent appraisers, but the amount is not binding upon either you or the government. The exact amount to be paid for the taking of your land will be determined either by agreement or by trial. However, the amount deposited is available for distribution in the discretion of the court to those found to be entitled to payment, without regard to whether or not an agreement has been reached and without prejudice to your right to claim a larger amount. If you desire to withdraw a portion of the amount on deposit, please advise this office. If, on the other hand, you are willing to accept the sum specified above as full payment of just compensation for the condemnation of the designated interest in your land, please notify us of that fact as soon as possible.

We will appreciate hearing from you, either by telephone or by letter, at your earliest convenience, so that we may know whether a trial of the issue of just compensation will be necessary in this case.

Very truly yours,

United States Attorney

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5.4.810 Sample Motions and Stipulations

5-4.811 Motion to Amend Complaint to Join Additional Parties

(Caption as in Complaint)

MOTION TO JOIN ADDITIONAL PARTIES DEFENDANT
AS TO TRACT(S) NO(S).

Plaintiff, United States of America, moves the Court to enter its order joining as additional parties defendant the following persons, as to the respective tracts of land set out opposite their names below:

In support of such motion, plaintiff shows the Court that subsequent to the commencement of this proceeding, the title evidence as to said tract(s) of land disclosed that said defendants may have some interest therein and they therefore are necessary parties to a full and complete adjudication of this matter.

Wherefore, plaintiff moves the Court to enter its order joining said persons as parties defendant in this proceeding.

United States Attorney

It is so ordered this day of _____, 19 ____.

United States District Judge

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5-4.812 Stipulation for Revestment

(Caption as in Complaint)

STIPULATION FOR REVESTMENT

WHEREAS, the plaintiff, United States of America, commenced the above-entitled action for the purpose of acquiring by eminent domain certain lands described as follows, to wit:

_____;

WHEREAS, the above-described tract is a part of the same land as that described in the following deeds:

_____;

WHEREAS, by reason of the filing of a declaration of taking and the depositing of \$ _____ as estimated just compensation for the taking thereof, title to such land, to the extent of the estate described below, vested in the United States of America on _____, 19__;

WHEREAS, it has been determined to be necessary to revest to the former owners title to the _____ heretofore described in above-described tract of land;

WHEREAS, the defendants _____ have agreed that by reason of the aforesaid they are not entitled to any just compensation for the interests acquired in the proceeding and have agreed further than the sum of \$ _____ remaining on deposit in the registry of the court shall be returned to the United States of America;

NOW, THEREFORE, IT IS STIPULATED AND AGREED BY AND BETWEEN THE UNITED STATES OF AMERICA, PLAINTIFF, AND THE ABOVE-NAMED DEFENDANTS _____ as follows:

(a) That the defendants herein consent to the revestment by the United States of the estate in the land as heretofore set forth;

(b) That said defendants consent to the withdrawal of any answer and/or interrogatories heretofore filed in the proceeding contesting the Government's right to acquire the land;

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(c) That the legal description of Tract _____ and the estate acquired therein, as set forth in the complaint in condemnation and the declaration of taking heretofore filed in the proceeding shall be deleted therefrom:

(d) That all right, title and interest of the stipulating defendants in and to any and all portions of the tract as set forth in the complaint in condemnation and the declaration of taking heretofore filed in the proceeding shall be excluded from the proceeding and title thereto shall be revested in said defendants to the extent held by them immediately prior to the taking;

(e) That the defendants in consideration of the foregoing waive any and all compensation for the taking of all interest acquired in the proceeding, and for the Government's use of that portion and/or interest in the land title to which is revested by this stipulation, including all damages arising therefrom;

(f) That judgment shall be entered pursuant hereto in accordance with the aforementioned terms and conditions.

In support of the foregoing stipulation, it is hereby represented to the court as follows:

I.

That this stipulation is intended as a voluntary appearance and express waiver of service of notice and of all other process and pleading, notice of hearing and trial by jury.

II.

That except as aforesaid on said date no other person, party or corporation was in possession of said lands and there were no unrecorded liens, leases, encumbrances or transfers outstanding affecting said property.

It is expressly understood and agreed that upon the entry of this Stipulation, the defendants and counsel agree to waive any and all claims of whatsoever kind including attorneys' fees and any other costs.

WHEREFORE, the parties hereto pray for judgment as appropriate to effectuate this stipulation.

DATED this ____ day of _____, 19 __.

UNITED STATES OF AMERICA

BY: _____
United States Attorney

APPROVED:

Attorney for Defendants

N.B.: Attorneys' fees and court costs are not awardable in eminent domain proceedings.

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5.4.813 Stipulation and Joint Motion to Dismiss

(Caption as in Complaint)

STIPULATION AND JOINT MOTION TO DISMISS
AS TO TRACT(S) NO(S).

Whereas plaintiff, United States of America, and defendant(s),
_____ stipulate and agree as follows:

1. The interests included in Tract(s) No(s). _____ in the
above proceeding are no longer required by the plaintiff.

2. No Declaration of Taking has been filed in this suit and title to
the estate described in the Complaint filed herein has not vested in the
United States of America.

3. An order of this Court previously has been entered giving
plaintiff possession of the land and estate described in the Complaint;
however, the United States has not taken actual possession of the property
of said defendant(s), and the plaintiff and defendant(s) stipulate and
agree that the Court may vacate such order of possession as to Tract(s)
No(s). _____ and any other order giving plaintiff
possession or an interest in said tract(s).

4. There are no existing claims for compensation with respect to
said tract(s) of land.

Therefore, plaintiff and defendant(s) agree that this proceeding
should be dismissed and defendant(s) hereby consent(s) to the entry by
the Court of all orders, judgments and decrees necessary and appropriate
to effectuate this stipulation and agreement without further notice to
said defendant(s).

Wherefore, premises considered, plaintiff, United States of America,
and _____, defendant(s) in Tract(s) No(s).
_____ in the above-styled and numbered cause,
move that the order of possession entered in such cause as to Tract(s)
No(s). _____ be vacated; and that the Court enter
an order of dismissal as to said tract(s) in this proceeding, on which
motion plaintiff and defendant(s) pray for judgment of the Court.

Dated this _____ day of _____, 19__.

United States Attorney

Defendant

Defendant

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5.4.814 Application for Withdrawal of Funds

(Caption as in Complaint)

APPLICATION FOR WITHDRAWAL OF ESTIMATED
COMPENSATION AS TO TRACT NO. _____

_____, hereinafter referred to as applicant, whether one or more, shows the Court:

1. At the time of the filing of the Declaration of Taking in this cause (s)he was the owner of (or the owner of an estate or interest in) Tract No. _____, more particularly described in the Declaration of Taking hereinbefore mentioned;

2. Said Declaration of Taking included the above-mentioned tract of land, subject to the exceptions noted therein, and the sum of \$ _____ was deposited in the registry of the Court as estimated compensation for the taking thereof;

3. (S)he is entitled to receive said deposit, no part or portion thereof has been paid to him/her, and the entire amount thereof remains in the registry of this Court, except: _____

4. (S)he was the owner of an interest or estate in said tract of land on the date of taking, as follows: _____

5. Applicant prays the Court to order the disbursement of \$ _____ of said deposit to him/her, subject to the following conditions:

(a) That out of said deposit all valid taxes, liens and encumbrances first shall be paid.

(b) That any amount paid to him/her from said deposit, and any sums paid therefrom to others for taxes, liens and encumbrances, shall be in part payment of any award finally made as to such tract if such award exceeds said sums.

(c) That in case it finally is determined that applicant is not entitled to receive said deposit, or any part thereof, (s)he agrees to refund into the registry of this Court said sum paid to him/her, or such part thereof as the Court may direct with interest at 6 percent per annum thereon; and further, that in the event a final

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judgment is entered herein for an amount less than that which has been expended for taxes, liens and encumbrances and that which has been paid directly to him/her, (s)he agrees to refund into the registry of the Court the amount by which such payments exceed said judgment, with interest at 6 percent per annum thereon.

(d) That this application is made without prejudice to applicant's right to claim additional compensation for the taking of said tract of land.

6. Applicant hereby expressly enters his/her appearance in the above proceeding for all purposes and waives the issuance, service and return of all process herein.

Applicant

Applicant

Subscribed and sworn to before me this day of _____,
19__.

Notary Public in and for _____

APPROVED:

United States Attorney

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5-4.815 Motion for Disbursement of Funds

(Caption as in Complaint)

MOTION TO DISBURSE FUNDS AS TO TRACT NO. _____

Plaintiff, United States of America, moves the Court for an order directing the Clerk of the Court to make the following disbursement(s) out of funds not in the registry of the Court to the credit of Tract No. _____.

Movant would show the Court that after making the disbursement(s) hereby requested, there would then remain in the registry of the Court to the credit of the above-mentioned tract of land the sum of \$ _____, which is ample to discharge any and all liens, encumbrances and charges upon said land.

Attached to this motion is an application for the withdrawal of funds which has been executed and sworn to by the aforementioned defendant(s) in this civil action.

WHEREFORE, movant prays the Court to enter an order directing the Clerk of the Court to make the disbursement(s) above set forth, and further directing the Clerk of the Court to credit such disbursement(s) to the funds now on deposit in the registry of the Court for Tract No. _____; and movant further prays that said disbursement(s) be made without prejudice to the right of said defendant(s) to demand and receive additional compensation for the taking of said tract of land.

United States Attorney

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5-4.816 Stipulation as to Amount of Just Compensation

(Caption as in Complaint)

STIPULATION AS TO COMPENSATION FOR TRACT NO.

Comes now the United States of America and the defendant(s) _____
_____, former owner(s) of Tract No. _____ herein,
more particularly described in the Declaration of Taking filed herein;
and

It is stipulated and agreed by and between the parties hereto that
the full just compensation payable by plaintiff, the United States of
America, for the taking of the said tract, together with all improvements
thereon and appurtenances thereunto belonging, shall be the sum of \$ _____
_____, inclusive of interest; and

It is further stipulated and agreed that the said sum of \$ _____
shall be subject to all liens, encumbrances and charges of whatsoever
nature existing against the said lands at the time of vesting of title
thereto in the United States of America and that all such liens,
encumbrances and charges of whatsoever nature shall be payable and
deductible from the said sum; and

It is further stipulated and agreed that the said sum shall be full
and just compensation and in full satisfaction of any and all claims of
whatsoever nature against the United States of America by reason of the
institution and prosecution of this action and the taking of the said
lands and all appurtenances thereunto belonging; and

The said parties hereby consent to the entry of any and all orders
and judgments necessary to effectuate this stipulation and agreement.

United States Attorney

Defendant

Defendant

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5-4.817 Motion for Order for Delivery of Possession

(Caption as in Complaint)

MOTION FOR ORDER FOR DELIVERY OF POSSESSION

Now comes the United States of America, the Plaintiff herein, and moves this Honorable Court for an order requiring all defendants to this action and any and all persons in possession or control of the property described in the Complaint filed herein to surrender possession of the said property, to the extent of the estate to be condemned, to the Plaintiff forthwith, and as grounds therefor the Plaintiff states that the Plaintiff has found and determined that it is necessary and advantageous to the interests of the Plaintiff to acquire such possession.

UNITED STATES OF AMERICA

BY: _____
United States Attorney

Assistant United States Attorney

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5-4.818 Certificate for Service by Publication

(Caption as in Complaint)

CERTIFICATE FOR SERVICE BY PUBLICATION

_____, attorney for plaintiff, hereby certifies that (s)he believes the hereinafter named defendant(s) cannot be personally served because after diligent inquiry within the state in which this action is pending the places of residence of the said defendants cannot be ascertained by plaintiff, or, if ascertained, the places of residence of said defendants are beyond the territorial limits of personal service as provided in Rule 71A, Federal Rules of Civil Procedure.

(Names of Defendants.)

United States Attorney

Address _____

Dated _____

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5-4.819 Certificate of Publication and Mailing

(Caption as in Complaint)

CERTIFICATE OF PUBLICATION AND MAILING

_____, Attorney for plaintiff, hereby certifies that (s)he caused the publication once a week for three weeks in the _____ of the notice, a printed copy of which is with the name and dates of the newspaper marked thereon is attached hereto and that prior to the date of last publication of said notice, he caused a copy thereof to be mailed to the defendant(s) named therein at his/her/their last known places(s) of residence.

United States Attorney

Dated: _____

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5-4.820 Sample Orders and Judgments

5-4.821 Final Judgment for Use When No Declaration of Taking Has Been Filed

(Caption as in Complaint)

FINAL JUDGMENT OF CONDEMNATION

It appearing to this Court that on the _____ day of _____, a Judgment Determining Compensation was entered in this cause by the Honorable _____, United States District Judge, adjudicating that the fee simple absolute title to the lands identified as Tract _____ as described in the Complaint and Notice of Lis Pendens, would vest in the United States of America simultaneously upon payment by the United States into the Registry of the Court of \$ _____, which amount was adjudicated to be full compensation for the taking of said lands,

And it further appearing that on the _____ day of _____, 19____, there was deposited by the United States of America, the Plaintiff, with the Clerk of the United States District Court for the District of _____, the sum of \$ _____, pursuant to said Judgment,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that on the _____ day of _____ 19____, the fee simple absolute title to the lands identified as Tract _____ as described in the Complaint, vested in the United States of America free and discharged of all claims and liens of every kind whatsoever.

Dated this _____ day of _____, 19____.

United States District Judge

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5-4.822 Order Appointing Guardian Ad Litem

(Caption as in Complaint)

ORDER APPOINTING GUARDIAN AD LITEM

It appearing to the Court that the defendant, _____
is _____ and does not have a duly appointed
representative within this State,

THE COURT FINDS that a Guardian Ad Litem should be appointed to
represent said defendant, and

THE COURT FINDS that the Honorable _____ has no
interest adverse to the said defendant,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED (s)he be, and is
hereby appointed Guardian Ad Litem to represent the said defendant.

DONE, this the _____ day of _____, 19__.

UNITED STATES DISTRICT JUDGE

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5-4.823 Order of Dismissal

(Caption as in Complaint)

ORDER OF DISMISSAL AS TO TRACT(S) NO(S).

On this day came on to be heard the stipulation and joint motion of the plaintiff, United States of America and defendant(s) _____ for an Order of Dismissal as to Tract(s) No(s). _____ in this proceeding; and it appearing to the Court that:

1. This suit was instituted by Complaint, that no Declaration of Taking has been filed, and that title to the estate described in said Complaint has not vested in the United States; and

2. On _____, the Court entered its Order giving possession to the plaintiff of the estate described in the Complaint; however, the United States no longer requires such estates in Tract(s) No(s). _____; and */

3. Both the plaintiff and defendant(s) herein have stipulated that the Court may vacate such Order of Possession; and, it is the opinion of the Court that such Order should be vacated; and */

It further appearing to the Court that there are no existing claims for compensation with respect to said tract(s) of land, and that both plaintiff and defendant(s) have stipulated and jointly moved that said tract(s) be dismissed from this proceeding, and that such motion should be granted;

It is therefore ordered, adjudged and decreed that the Order of Possession entered herein be vacated as to Tract(s) No(s). _____; */

It is further ordered, adjudged and decreed by the Court that this proceeding be and it is hereby dismissed as to said tract(s).

Entered this ____ day of _____, 19__.

United States District Judge

*/ To be used only when Order of Possession has issued.

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5-4.824 Order for Disbursement of Funds

(Caption as in Complaint)

ORDER TO DISBURSE FUNDS AS TO TRACT NO.

Plaintiff, United States of America, having moved the court for an order directing the Clerk of the Court to disburse funds out of the registry of the Court to the defendant(s) _____, and to credit said disbursement(s) to the funds now on deposit in the registry of the Court to the credit of Tract No. _____, and the Court having considered said motion and having read the application(s) is of the opinion that said motion should be granted.

IT IS, THEREFORE, ORDERED that the Clerk of this Court be and hereby is ordered to make the following disbursement(s) out of the funds in the registry of the Court:

IT IS FURTHER ORDERED that said disbursement(s) be credited to Tract No. _____, that said disbursement(s) be without prejudice to the right of said defendant(s) to demand and receive additional compensation for the taking of said tract of land, and that should the compensation finally determined to be due to said defendant(s) be less than the amount hereby disbursed, the United States shall have a right to recover the difference between the amount disbursed pursuant thereto and the amount of the final judgment determining compensation, with the interest at 6 percent per annum thereon.

ENTERED THE _____ day of _____, 19____.

United States District Judge

Approved:

United States Attorney

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5-4.825 Order of Final Distribution

(Caption as in Complaint)

ORDER OF FINAL DISTRIBUTION

Upon consideration of the deposit of \$ _____, in the registry of this Court on _____, 19____, in satisfaction of the judgment entered herein fixing the just compensation payable by the plaintiff for the taking of said lands, it is by the Court this ____ day of _____, 19____,

ORDERED that the clerk of this Court draw his/her check forthwith upon the entry of this order, in the amount of the aforesaid deposit, to the order of _____ upon the filing by the payees thereof or their attorney of record of a praecipe with the clerk of the court entering the aforesaid judgment satisfied.

UNITED STATES DISTRICT JUDGE

Consented to:

Attorney, Department of Justice

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5-4.826 Judgment on Stipulation of Just Compensation

(Caption as in Complaint)

JUDGMENT DETERMINING JUST COMPENSATION

Pursuant to a stipulation filed in this cause agreeing to the amount of just compensation for the taking of the property herein, it is by the Court this _____ day of _____, 19__,

ADJUDGED AND ORDERED that the just compensation payable by the plaintiff for the taking of the fee simple title absolute to said lands is the sum of \$ _____, inclusive of interest,* and judgment is hereby entered against _____ in the aforesaid amount, and the said _____ shall deposit the additional sum of \$ _____, in the registry of this Court in satisfaction of the judgment.

United States District Judge

Consented to:

Attorney, Department of Justice

Footnote

* In a complaint only case, eliminate the words "inclusive of interest."

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5-4.827 Order for Delivery of Possession

(Caption as in Complaint)

ORDER FOR DELIVERY OF POSSESSION

This action coming on for hearing ex parte upon motion of the Plaintiff for an order for the surrender of possession of the property described in the Complaint filed herein to Plaintiff, and it appearing that Plaintiff is entitled to possession of said property:

It is hereby adjudged that all defendants to this action and all persons in possession or control of the property described in the Complaint filed herein shall surrender possession of said property to the extent to the estate being condemned, to the Plaintiff on or before _____; */ provided that a notice of this order shall be served upon all persons in possession or control of the said property forthwith.

Dated this _____ day of _____, 19__.

United States District Judge

*/ or "immediately."

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5-4.828 Order Appointing Commission

(Caption as in Complaint)

ORDER APPOINTING COMMISSION UNDER
FEDERAL RULES OF CIVIL PROCEDURE

The Court having concluded that, because of the character, location and quantity of the land being condemned by Plaintiff, United States of America, in this cause and because such would be in the interest of justice, the issue of just compensation to be paid the landowners for the lands being condemned herein should be determined by a Commission of three persons as provided for by Rule 71A, Federal Rules of Civil Procedure;

It is accordingly ordered by the Court that the following be, and they are hereby, appointed Commissioners under said above-mentioned rule: _____ who shall act as Chairperson, _____ and _____.

It is further ordered that this cause be and the same is hereby referred to said Commission, which shall determine the just compensation to be paid the landowner or landowners as to each tract of land, or interest therein condemned, in this cause involved.

On the _____ day of _____ at _____ in the United States District Courthouse Court Room No. _____, the Court will instruct the Commission as to its powers and duties in accordance with Rules 71A(h) and 53(c) and (d) of the Federal Rules of Civil Procedure. As soon thereafter as practicable the Commission should commence hearings at such place or places as may be proper and necessary.

Ordered and entered this _____ day of _____, 19__.

United States District Judge

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5-4.829 Order Fixing Fees of Commissioners

(Caption as in Complaint)

ORDER FIXING FEES OF COMMISSIONERS

WHEREAS, the Court has appointed _____
_____ and _____ Special
Commissioners under Rule 71A, Federal Rules of Civil Procedure, to hear
evidence and to render a report as to the value of the several tracts of
land incorporated in the above-entitled and numbered cause and in said
Order Appointing did appoint _____ as Chairperson of
said Commission; and,

WHEREAS, said Commissioners are entitled to remuneration for their
services rendered and to be rendered in the trial of said tracts of land
which appear before them;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above-named
Commissioners, be paid the sum of \$145.36 per day for their services, this
____ day of _____, 19____.

United States District Judge

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5-4.830 Samples of Supportive Documentation

5-4.831 Certificate of Inspection and Possession

(Caption as in Complaint)

CERTIFICATE OF INSPECTION AND POSSESSION

I, _____, a _____ of the Department of _____, hereby certify that on the _____ day of _____, 19____, I made a personal examination and inspection of that certain tract or parcel of land situated in the County of _____, State of _____, designated as Tract No. _____, and containing _____ acres (proposed to be) acquired by the United States of America in connection with the _____ Project (from _____) in the condemnation proceeding entitled _____, Civil No. _____.

1. That I am fully informed as to the boundaries, lines and corners of said tract; that I found no evidence of any work or labor having been performed or any materials having been furnished in connection with the making of any repairs or improvements on said land; and that I made careful inquiry of the above-named vendor (and of the occupants of said land) and ascertained that nothing had been done on or about said premises within the past _____ months that would entitle any person to a lien upon said premises for work or labor performed or materials furnished.

2. That I also made inquiry of the above-named vendor (and of all occupants of said land) as to his/her/their rights of possession and the rights of possession of any person or persons known to him/her/them, and neither found any evidence nor obtained any information showing or tending to show that any person had any rights of possession or other interest in said premises adverse to the rights of the above-named vendor or the United States of America.

3. That I was informed by the above-named vendor (and by all other occupants) that to the best of his/her/their knowledge and belief there is no outstanding unrecorded deed, mortgage, lease, contract, or other instrument adversely affecting the title to said premises.

4. That to the best of my knowledge and belief after actual and diligent inquiry and physical inspection of said premises there is no evidence whatever of any vested or accrued water rights for mining, agricultural, and manufacturing, or other purpose, nor any ditches or

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canals constructed by or being used thereon under authority of the United States, nor any exploration or operations whatever for the development of coal, oil, gas, or other minerals on said lands; and that there are no possessory rights now in existence owned or being actively exercised by any third party under any reservation contained in any patent or patents heretofore issued by the United States for said land.

5. That to the best of my knowledge and belief based upon actual and diligent inquiry made there is no outstanding right whatsoever in any person to the possession of said premises nor any outstanding right, title, interest, lien, or estate, existing or being asserted in or to said premises except such as are disclosed and evidenced by the public records.

6. That said premises are now wholly unoccupied and vacant except for the occupancy of the following, from whom disclaimer(s) of all right, title and interest in and to said premises, executed on the _____ day of _____, 19____, has (have) been obtained:

Name _____, Address _____,
Statement of Interest Claimed _____.

Dated this _____ day of _____, 19____.

Approved:

(Name)

(Title)

N.B.: To be prepared at or near the date of taking.

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5.4.832 Certificate of Title

CERTIFICATE OF TITLE

Name of title company _____ Address _____

To (_____ and) United States of America:

The _____, a Corporation organized and existing under the laws of the State of _____, with its principal office in the city of _____, certifies that it has (made)(obtained a report showing) a thorough search of the title to the property described in Schedule A hereof, beginning with the ____ day of _____, 19 __, and hereby certifies that the title to said property was indefeasibly vested in fee simple of record in _____ as of the ____ day of _____, 19 __, free and clear of all encumbrances, defects, interests, and all other matters whatsoever, either of record or otherwise known to the corporation, impairing or adversely affecting the title to said property, except as shown in Schedule B hereof.

The maximum liability of the undersigned under this certificate is limited to the sum of \$ _____.

In consideration of the premium paid, this certificate is issued for the use and benefit of (said _____ and) the United States of America (and each of them).

In witness whereof, said Corporation has caused these presents to be signed in its name and behalf, sealed with its corporate seal, and delivered by its proper officers thereunto duly authorized, as to the date last above mentioned.

(Name of title company)

By _____
(Title of executing officer)

Attest:

(Title of attesting officer)

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SCHEDULE A

The property covered by this certificate is accurately and fully described as follows: _____

SCHEDULE B

The property described in Schedule A hereof is free and clear from all interests, encumbrances, and defects of title and all other matters whatsoever of record, or which, though not of record, are known to this corporation to exist impairing or adversely affecting the title to said property, except the following:

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5-4.833 Disclaimer

(Caption as in Complaint)

APPEARANCE AND DISCLAIMER

NOW COME the undersigned defendants in the above-styled and numbered condemnation proceeding, enter their appearance herein for all purposes, waive service of all notices, and disclaim any right, title, claim or interest in the compensation paid or to be paid for the taking of said tracts.

Dated:

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5.4.834 Answer of Tax Collector

(Caption as in Complaint)

ANSWER OF TAX COLLECTOR AS TO TRACTS(S) NO(S).

Defendant, Tax Collector in and for _____, hereby appears in this proceeding, waives issuance of any and all service of process and all notices, and for his/her answer alleges that the land designated in this proceeding as Tract(s) No(s). _____, which at the time of the taking, _____, was assessed to _____, is located within _____, and that all taxes, including those for the year 19____, and all prior years which have been assessed against said property have been paid heretofore, or are due as shown below:

The total amount of taxes assessed against said property which has not been paid, as set forth above, is the sum of \$_____, which should be paid to this defendant in his/her capacity as Tax Collector.

Wherefore, defendant prays that this court enter an order disbursing out of the funds on deposit to the credit of the aforesaid tract(s) the amount of \$_____ to said defendant in payment of all taxes against said property.

Dated this the _____ day of _____, 19__.

Tax Collector in and for _____

(Address)

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5.4.835 Answer of Lienholder

(Caption as in Complaint)

ANSWER OF TAX LIENHOLDER AS TO TRACT(S) NO(S).

1. _____, defendant (by his/her attorney, _____) states that (s)he claims to have a lien against the property described as Tract(s) No(s). _____ in the Complaint filed herein.

2. The nature and extent of the lien so claimed is: _____

3. At the time of the filing of the Declaration of Taking, _____, in this proceeding, there was due and owing upon the indebtedness secured by said lien the sum of \$ _____.

4. There is now due and owing upon said indebtedness the sum of \$ _____.

Wherefore, defendant prays that this court enter an order disbursing to him/her out of the funds on deposit to the credit of the aforesaid tract(s) the amount of \$ _____.

Dated this the _____ day of _____, 19____.

(Signed by defendant lienholder or
his/her attorney)

(Address)

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5.4.836 Waiver of Service

(Caption as in Complaint)

WAIVER OF SERVICE AS TO TRACT(S) NO(S).

_____, defendant in the above-entitled and numbered cause, hereby enters his/her appearance generally in this proceeding for all purposes, waives any and all service of notice of the filing of this proceeding, says that (s)he is fully advised in the premises and waives all further notice or service of process herein.

Dated this the _____ day of _____, 19__.

(Defendant)

(Address)

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5-4.837 Affidavit of Heirship

(Caption as in Complaint)

AFFIDAVIT OF HEIRSHIP

I, _____ (Name of affiant), residing at _____ (Street and number), _____ (City or town), _____ (County), _____ (State), being of full legal age, for the purpose of establishing the legal ownership of certain land in _____ (City or town), _____ (County), _____ (State) proposed to be purchased by the United States of America from all the lawful heirs of _____ (Name of decedent) late of _____ (City or town), _____ (County), _____ (State), who died on the _____ day of _____, 19____, at the age of _____ years, a resident of _____ (City or town), _____ (County), _____ (State), on oath depose and say as follows:

(1) That I was personally acquainted with the above-named decedent for the period of _____ years from _____ 19____, until his/her death, and that my relationship to said decedent was _____.

(2) That said decedent was married to _____ (Spouse) at _____, in 19____, who (survived) (predeceased). (The affiant should cross out any statement enclosed in parenthesis which is not applicable to said decedent.)

(3) That the following is a list of the full names, relationships to the decedent, ages, marital status, and addresses of all surviving issue or other heirs of said decedent:

Full Name	Relationship to decedent	Age	Married to	Address

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(4) (That said decedent left no will, no issue, or no collateral heirs other than those named above and no unpaid debts or claims except as stated below.) (That I have made careful inquiry and that to the best of my information and belief said decedent left no will, no issue, or no collateral heirs other than those named above, and no unpaid debts or claims except as stated below.) (The affiant should cross out any statement enclosed in parenthesis which is not applicable. All statements made by the affiant will be considered to be made on the affiant's personal knowledge unless the contrary is expressly indicated.)

(Unpaid debts)

(5) That the value of the decedent's entire estate at death, including all property, real and personal, then owned by the decedent, did not exceed \$ _____

(6) That I am (not) interested financially or by reason of relationship to said decedent in the proposed conveyance to the United States of America in connection with which this affidavit is furnished, and understand that it is secured for the purpose of inducing the United States to purchase land owned by said decedent.

_____, 19__

_____, ss:

There personally appeared before me the above-named _____, who subscribed the foregoing affidavit and made oath that the statements contained therein are true.

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5-4.838 Oath of Commissioners

(Caption as in Complaint)

OATH OF COMMISSIONER

The undersigned, _____ appointed by the United States District Court Judge in the District of _____, as Commissioner to assess and award just compensation for the taking of the real property and interest herein designated as: Civil No. _____, Tract Nos. _____ the above Tracts being more particularly described in the pleadings for condemnation heretofore filed and the undersigned being duly sworn, says that (s)he is a resident of _____, and is not interested in the same or any like question as that involved herein; that (s)he will, to the best of his/her ability, faithfully and impartially assess the just compensation for the taking of the real property by the United States as hereinbefore set out, and that (s)he will make a written report to the Court of all proceedings in connection with the appraisalment of said real property, and do all other acts as required by him/her as such Commissioner according to the Order and Instructions of this Court.

(Name of Commissioner)

STATE OF)
) ss
COUNTY OF)

Subscribed and sworn to before me this _____ day of _____,
19 ____.

NOTARY PUBLIC

My Commission expires: _____

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5-4.839 Title Insurance Policy

OWNERS TITLE GUARANTEE (INSURANCE) POLICY
POLICY OF TITLE INSURANCE

ISSUED BY
BLANK TITLE INSURANCE COMPANY

Policy Number _____ Amount \$ _____

Blank Title Insurance Company, a blank corporation, herein called the Company, for a valuable consideration

HEREBY INSURES
THE UNITED STATES OF AMERICA

hereinafter called the Insured, against loss of damage not exceeding _____ Dollars, together with costs and expenses which the Company may become obligated to pay as provided in the Conditions and Stipulations hereof, which the Insured shall sustain by reason of:

Any defect in or lien or encumbrance on the title to estate or interest covered hereby in the land described or referred to in Schedule A, existing at the date hereof, not shown or referred to in Schedule B or excluded from coverage by the General Exceptions;

all subject, however, to the provisions of Schedule A and B and to the General Exceptions and to the Conditions and Stipulations hereto annexed; all as of the _____ day of _____, 19____, the effective date of this policy.

In witness whereof, Blank Title Insurance Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers.

Countersigned:

BLANK TITLE INSURANCE COMPANY,

By _____
President

By _____
Secretary

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SCHEDULE A

1. The estate or interest in the land described or referred to in this schedule covered by this policy is:

(Will be shown as a fee or such lesser estate or interest owned by the person or party named in paragraph 2 of this Schedule.)

2. Title to the estate or interest covered by this policy at the date hereof is vested in: _____

The land referred to in this policy is situated in the County of _____, State of _____, and is described as follows:

(This phraseology may be modified to eliminate a specific description by including it by reference to the description as contained in a specific instrument.)

SCHEDULE B

This policy does not insure against loss or damage by reason of the following:

1. Current and delinquent taxes and assessments as follows:

(List all taxing districts in which the land is situated and other taxing authorities that have jurisdiction over said land for the levy of taxes, showing lien date for each and amounts for all such assessments that have not been paid on the date of the policy.)

2. (Continue with the Special Exceptions such as recorded easements, liens, etc., showing in addition the persons or parties holding such interests of record, and who the Company would require to convey such interest or who would be the proper parties defendant in a condemnation proceeding to eliminate such matter.)

The write-up could be substantially as follows:

An easement for road purposes conveyed to _____, by deed recorded _____.)

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GOVERNMENTAL POWERS

1. Because of limitations imposed by law on ownership and use of property, or which arise from governmental powers, this policy does not insure against:

(a) consequences of the future exercise or enforcement or attempted exercise or enforcement of police power, bankruptcy power, or power of eminent domain, under any existing or future law or governmental regulations; (b) consequences of any law, ordinance or governmental regulation, now or hereafter in force (including building and zoning ordinances), limiting or regulating the use or enjoyment of the property, estate or interest described in Schedule A, or the character, size, use or location of any improvement now or hereafter erected on said property.

MATTERS NOT OF RECORD

2. The following matters which are not of record at the date of this policy are not insured against:

(a) rights or claims of parties in possession not shown of record; (b) questions of survey; (c) easements, claims of easement or mechanics' liens where no notice thereof appears of record; and (d) conveyances, agreements, defects, liens or encumbrances, if any, where no notice thereof appears of record; provided, however, the provisions of this subparagraph 2(d) shall not apply if title to said estate or interest is vested in the United States of America on the date hereof.

MATTERS SUBSEQUENT TO DATE OF POLICY

3. This policy does not insure against loss or damage by reason of defects, liens or encumbrances created subsequent to the date hereof.

REFUSAL TO PURCHASE

4. This policy does not insure against loss or damage by reason of the refusal of any person to purchase, lease or lend money on the property, estate or interest described in Schedule A.

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CONDITIONS AND STIPULATIONS

Notice of Actions

1. If any action or proceeding shall be begun or defense asserted which may result in an adverse judgment or decree resulting in a loss for which this Company is liable under this policy, notice in writing of such action or proceeding or defense shall be given by the Attorney General to this Company within 90 days after notice of such action or proceeding or defense has been received by the Attorney General; and upon failure to give such notice then all liability of this Company with respect to the defect, claim, lien or encumbrance asserted or enforced in such action or proceeding shall terminate. Failure to give notice, however, shall not prejudice the rights of the party insured, (1) if the party insured shall not be a party to such action or proceeding, or (2) if such party, being a party to such action or proceeding be neither served with summons therein nor have actual notice of such action or proceeding, or (3) if this Company shall not be prejudiced by failure of the Attorney General to give such notice.

Notice of Writs

2. In case knowledge shall come to the Attorney General of the issuance or service of any writ of execution, attachment or other process to enforce any judgment, order or decree adversely affecting the title, estate or interest insured said party shall notify this Company thereof in writing within 90 days from the date of such knowledge; and upon a failure to do so, then all liability of this Company in consequence of such judgment, order or decree or matter thereby adjudicated shall terminate unless this Company shall not be prejudiced by reason of such failure to notify.

Defense of Claims

3. This Company agrees, but only at the election and request of the Attorney General of the United States, to defend at its own cost and expense the title, estate or interest hereby insured in all actions or other proceedings which are founded upon or in which it is asserted by way of defense, a defect, claim, lien or encumbrance against which this policy insures, provided, however, that the request to defend is given with sufficient time to permit the Company to answer or otherwise participate in the proceeding. If any action or proceeding shall be begun or defense

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be asserted in any action or proceeding affecting or relating to the title, estate or interest hereby insured and the Attorney General elects to defend at the Government's expense, the Company shall upon request, cooperate and render all reasonable assistance in the prosecution or defense of such proceeding and in prosecuting appeals.

If the Attorney General shall fail to request and permit the Company to defend, then all liability of the Company with respect to the defect, claim, lien or encumbrance asserted in such action or proceeding shall terminate; provided, however, that if the Attorney General shall give the Company timely notice of all proceedings and an opportunity to suggest such defenses and actions as it shall conceive should be taken and the Attorney General shall present the defenses and take the actions of which the Company shall advise him/her in writing, then the liability of the Company shall continue; but in any event the Company shall permit the Attorney General without cost or expense to use the information and facilities of the Company for all purposes which (s)he thinks necessary or incidental to the defending of any such action or proceeding or any claim asserted by way of defense therein and to the prosecuting of any appeal.

Compromise of Adverse Claims

4. Any compromise, settlement or discharge by the United States or its duly authorized representative of an adverse claim, without the consent of this Company shall bar any claim against the Company hereunder. Provided, however, that the Attorney General may at his/her election submit to the issuing company for approval or disapproval any proposed compromise, settlement or discharge of any adverse claim and in the event of the consent of the issuing company to the proposed compromise, settlement or discharge it shall be liable for the payment of the full amount paid.

Statement of Loss

5. A statement in writing of any loss or damage sustained by the party insured, and for which it is claimed this Company is liable under this policy, shall be furnished by the Attorney General to this Company within 90 days after said party has notice of such loss or damage and no right of action shall accrue under this policy until 30 days after such statement shall have been furnished. No recovery shall be had under this policy unless suit be brought thereon within one year after said period of

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30 days. Failure to furnish such statement of loss or to bring such suit within the times specified shall not affect the Company's liability under this policy unless this Company has been prejudiced by reason of such failure to furnish a statement of loss or to bring such suit.

Policy Reduced by Payments of Loss

6. All payments of loss under this policy shall reduce the amount of this policy pro tanto.

Amendment of Policy

7. No provision or condition of this policy can be waived or changed except by writing endorsed hereon or attached hereto signed by the President, a Vice President, the Secretary, and Assistant Secretary or other validating officer of the Company.

Notice, Where Sent

8. All notices required to be given the Company and any statement in writing required to be furnished by Company shall be addressed to it at (insert proper address).

ENDORSEMENT

Attached to Policy No. _____

Issued by _____

BLANK TITLE INSURANCE COMPANY

1. Schedule A of the above policy is hereby amended in the following particulars:

(a) Paragraph 1 of Schedule A is hereby deleted and the following is substituted:

1. The estate or interest in the land described or referred to in this Schedule covered by this policy is:

(An easement for _____.)

(b) Paragraph 2 of Schedule A is hereby deleted and the following is substituted:

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2. Title to the estate or interest covered by this policy at the date hereof is vested in:

THE UNITED STATES OF AMERICA

(Follow with appropriate reference to Declaration of Taking or Deed.)

(c) Paragraph 3 of Schedule A is hereby deleted and the following is substituted:

3. Schedule B of the above policy is hereby amended in the following particulars:

(a) Paragraphs numbered _____, _____, _____ and _____ of Schedule B are hereby deleted. (Enumerate those paragraphs eliminated by proper releases, conveyances, etc.)

(b) Schedule B of the above policy is amended by adding the following paragraphs numbered _____ to _____, inclusive.

3. Subparagraph 2(d) of the General Exceptions of the above policy is hereby deleted.

4. The effective date of the above policy is hereby extended to _____.

(Date of recording of Deed or Notice of Action, since no insurance is to be afforded as to regularity of proceedings.)

The total liability of the Company under said policy and this endorsement thereto shall not exceed, in the aggregate, the sum of \$ _____ and costs which the Company is obligated under the Conditions and Stipulations thereof to pay.

This endorsement is made a part of said policy and is subject to the Schedules, General Exceptions and the Conditions and Stipulations therein, except as modified by the provisions hereof.

Dated _____

BLANK TITLE INSURANCE COMPANY,

By _____
(Authorized Officer)

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5-4.840 Forms for Use in Small Tract Program

5-4.841 Letter "A"

Dear Sir:

Re: Civil Action No. _____, Tract(s)
Nos). _____, Amount
deposited as estimated just compensation:

Our records show that the United States heretofore has filed a condemnation suit to acquire an interest in certain land owned by you, designated by tract number(s) as above, and has deposited in the registry of the United States District Court, as estimated just compensation, the amount of money indicated above. This land was acquired for use in connection with the _____ Project. You previously have been served with notice of the filing of this condemnation suit.

We should like to close this matter as soon as possible. Therefore, if you are willing to accept the sum specified above as just compensation for the condemnation of the designated interest in your land, will you please notify us by return mail? If this meets with your approval, we will prepare the necessary papers for your signature and arrange for the disbursement of money in the registry of the court, if this has not already been done.

We have made arrangements with the United States District Court for the trial during _____ of all cases which cannot be closed by agreement without trial.

A self-addressed envelope, which requires no postage, is enclosed for your convenience in replying to this letter. If you prefer, you may telephone the office of the United States Attorney at _____. The telephone number is _____. We will appreciate it if you will let us hear from you within one week from receipt of this letter so that we may know whether a trial of the issue of just compensation will be necessary in this case.

Yours very truly,

United States Attorney

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5-4.842 Letter "B"

Dear Sir:

Re: Civil Action No. _____, Tract(s) No(s). _____
Amount deposited as estimated just compensation:

Our records indicate that you have appeared as attorney for the landowners in connection with condemnation proceedings which have been filed on the above-designated tract of land, which has been acquired in connection with the _____ Project.

A special effort is being made at this time to close this case as soon as possible. The court has indicated that it may be tried during _____, if a trial should be necessary. Will you please contact this office within one week and let us know if your clients will accept the amount deposited as just compensation, or if the case must be tried.

Your cooperation and prompt reply will be appreciated.

Yours very truly,

United States Attorney

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5-4.843 Letter "C"

Dear Sir:

Re: Civil Action No. _____, Tracts(s)
No(s). _____ . Amount
deposited as estimated just compensation:

We have not received a reply from you to our recent letter, in which we inquired whether you were willing to accept the amount deposited by the United States as just compensation for the condemnation of an interest in certain property owned by you, and designated by tract number as above. As indicated in our letter, it is our intention to close this matter, either by agreement or by trial, as promptly as possible. Arrangements have been made with the United States District Court to try this case in _____, if it cannot be settled by agreement.

If you are unwilling to accept the amount set out above as just compensation, would you please let us know what amount of money you feel would be fair to you and to the Government as compensation for the taking of the interest in your property? We are anxious to do everything possible and reasonable in order to bring about a mutually acceptable settlement of this case without the necessity of a trial.

A self-addressed envelope, which requires no postage, is enclosed for your convenience in replying to this letter. If you prefer, however, you may call this office. Our telephone number is _____. If you wish to come to this office to discuss this matter, will you please telephone in advance so that an appointment can be made? In this way we may avoid your having to wait until an Assistant United States Attorney is free to talk with you.

Please let us hear from you within one week from receipt of this letter, so that we may know whether this case will be tried in _____.

Yours very truly,

United States Attorney

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5-4.844 Letter "D"

Dear Sir:

Re: Civil Action No. _____
Tract(s) No(s). _____

We have not received a reply from you to our recent letter, in which we inquired whether the above-mentioned condemnation case can be settled. Would you please let us hear from you?

Arrangements have been made for the trial of the case in _____ and, unless we hear from you, it will be tried at that time.

Yours very truly,

United States Attorney

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5-4.845 Letter "E"

Dear Sir:

Re: Civil Action No. _____
Tract(s) No(s). _____

Enclosed is a stipulation and a judgment setting the amount of just compensation due for the condemnation of an interest in your land, designated by tract number as above. You have indicated that this is acceptable to you and that a trial in this case therefore will be unnecessary.

Please sign the stipulation on the lines indicated by an "x" and return one copy to this office in the enclosed envelope, which requires no postage. The extra copy of the stipulation and the copy of the judgment may be retained by you. Nothing further need be done by you. */

We appreciate your cooperation.

Yours very truly,

United States Attorney

Enclosures

*/ When funds remain to be disbursed, whether the original deposit or a deficiency, add an appropriate sentence to the effect that disbursement will be made promptly.

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5-4.846 Letter "F"

Dear Sir:

Re: Civil Action No. _____
Tract(s) No(s). _____

This will confirm your appointment to discuss possible settlement of the above-pending condemnation case. The conference is scheduled for _____, at _____ o'clock _____ A.M./P.M. at this office.

Yours very truly,

Assistant United States Attorney

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5-4.847 Notice of Hearing

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF _____

MEMORANDUM

TO: All parties in interest in the below-mentioned case and to all attorneys who have entered their respective appearances on behalf of one or more such parties.

RE: United States of America v. _____
_____, Civil No. _____

A hearing will be held _____ at _____
_____ in this court to determine the issue of the amount of just compensation to be paid and to be distributed to all and each of the parties in this case.

If you plan to appear at the hearing on _____ you are requested to notify this Court by return mail. In any event, all and each of the parties will be bound by the determinations and rulings made by this Court at the hearing, whether or not you appear, unless good cause to the contrary is shown.

Very truly yours,

Clerk

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5-4.852 Memorandum in Support of Motion for Summary Judgment

(Caption as in Complaint)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

The option agreement which is attached to the Motion of the United States for Summary Judgment is self-explanatory. It will be noted that it provides that the vendors agreed to sell the property involved and to execute a deed thereto to the United States, and that the Government accepted the option in due time. It will be further noted that the vendors agreed that the United States may, notwithstanding the prior acceptance of this offer, acquire title to said land by condemnation or other judicial proceedings, in which event the vendor agrees to cooperate with the United States in the prosecution of subject proceedings, and agrees that the considerations as stated therein shall be the full amount of the award of just compensation, exclusive of interest, for the taking of said land.

The authority for the motion is Rule 56 of the Federal Rules of Civil Procedure.

In addition, the United States Supreme Court in Danforth v. United States, 308 U.S. 271, 181-183 (1939), held that, even if an offer were accepted, "friendly condemnation proceedings" could be instituted to clear title with a request for an award in the amount of the offer. In the case cited, supra, after acceptance, the United States attempted to withdraw the offer, then condemned. After stating the agreement was authorized, the Supreme Court held:

The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title.

In Albrecht v. United States, 329 U.S. 599, 602-603 (1947), the Court stated in part as follows:

But the method used by courts to determine "just compensation" in an adversary proceeding where the parties have failed previously to agree on its amount is not the exclusive method for determining that question. The Fifth Amendment does not prohibit

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landowners and the Government from agreeing between themselves as to what is just compensation for property taken. Nor does it bar them from embodying that agreement in a contract, as was done here.

See also Wachovia Bank & Trust Company v. United States, 98 F.2d 609, 612 (4th Cir. 1938); United States v. Two Acres in Will County, 144 F.2d 207 (7th Cir. 1944); Mahowald v. United States, 176 F.2d 509 (8th Cir. 1949).

It is submitted that based upon the option agreement as duly executed by the vendors and accepted by the Government there is no genuine issue as to the amount of just compensation to be received by the owners of Tract(s) No(s). _____ and that an order of this Court should be entered fixing said compensation in accordance with the motion filed herein by plaintiff.

UNITED STATES OF AMERICA

BY: _____

United States Attorney

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5-4.853 Show Cause Order

(Caption as in Complaint)

ORDER OF COURT

AND NOW, To wit, _____ upon motion of
the United States of America, and it appearing that _____

it is hereby ORDERED that a hearing be held on _____
to determine title questions, and a rule granted upon defendants as
recited in said motion to show cause why a summary judgment of just
compensation should not be entered in the sum of \$ _____ in favor of
_____.

It is further ORDERED that all parties who claim any interest
whatsoever in the aforementioned tract(s) appear on the stated hearing
date to show why a summary judgment of just compensation should not be
entered in favor of _____.

United States District Judge

Filed: _____

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5-4.854 Order Granting Summary Judgment

(Caption as in Complaint)

ORDER

On _____, a hearing was had before the Court upon plaintiff's Motion for Summary Judgment praying that just compensation for the taking by plaintiff of Tract(s) No(s). _____ be fixed at the sum of \$ _____, the plaintiff appearing by _____. The Court, being fully advised in the premises, has determined the owner of Tract(s) No(s). _____, as of _____, to be _____

and has determined that the Government's Motion for Summary Judgment be granted and that the full, fair and just compensation for the interest taken by the United States in Tract(s) No(s). _____ is hereby fixed at the sum of \$ _____.

IT IS ORDERED AND ADJUDGED THAT the plaintiff's Motion for Summary Judgment be and the same is hereby granted and the compensation to be paid by plaintiff to _____ for the taking of the estate in Tract(s) No(s). _____ is hereby fixed at the sum of \$ _____.

Date

United States District Judge

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5-4.860 DOJ and OBD Forms

5-4.861 Notice of Order Appointing Commission and Estimate of Expense

FORM OBD-108
Rev. 1-10-75

UNITED STATES DEPARTMENT OF JUSTICE
NOTICE OF ORDER APPOINTING CONDEMNATION COMMISSION AND
ESTIMATE OF EXPENSE TO BE INCURRED

TO: Philip B. Stiness, Jr.
Chief, Management and Budget Section
Department of Justice
Washington, D. C. 20530

_____ District of _____

(Place and date)

FROM: _____
(Name, please type)

(Title)

(Signature)

D.J. File No. _____

Civil and Tract No. _____

Approx. Date of Hearing _____

N Pursuant to Order, dated _____, a copy of which is attached,
O the Honorable _____, United States District Judge,
T appointed a Commission under Rule 71A(h) of the Federal Rules of Civil
I Procedure to determine the issue of just compensation in the action described
C above.
E

It is expected that the Commission will incur expenses as follows:

E S T I M A T E D E X P E N S E	Compensation: Chairman, _____ hrs. @ \$ _____ per day \$ _____ Member, _____ hrs. @ \$ _____ per day _____ Member, _____ hrs. @ \$ _____ per day _____ Total compensation \$ _____ Other expenses: Transportation \$ _____ Subsistence _____ Other (explain) _____ Estimated total expense \$ _____
--	--

Date _____

P
A
Y
M
E
N
T

Fees and expenses incurred under the cited Order are payable from the appropriation 15 0322, upon submission to this Office of duly executed vouchers supported by a copy of the Court Order fixing the compensation and expenses of the Commission and this form.

Department of Justice

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Instructions

1. This form should be prepared and submitted to the Department immediately upon issuance of a Court Order appointing a Commission.
2. Expenses should be computed as carefully as possible. If no fees or allowances are specified in the Order appointing the Commission, the amounts should be based on rates and expenses previously allowed in your district for such purposes. Otherwise please consult the appointing judge for assistance in arriving at a reasonable approximation of the fees and expenses to be incurred. This is important as the Department will use this information to obligate (reserve) the funds needed to pay the Commissioners upon completion of their services.
3. Submit original and four copies of form. The original and one copy will be returned -- the original to be attached to the voucher when submitted for payment, the copy to be retained for your files.

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5-4,862.1 Expert Witness Agreement

OSD-12 (Formerly DJ-36)
(Rev. 7-25-75)

**UNITED STATES DEPARTMENT OF JUSTICE
EXPERT WITNESS AGREEMENT**

INSTRUCTIONS: Form should be prepared in triplicate. Each copy must be signed by the negotiating attorney and the expert witness.

DISTRIBUTION:

ORIGINAL - Hold and submit to Accounting Section, Operations Support Staff, Office of Management and Finance, with original payment voucher.

COPY NO. 1 - To Expert Witness

COPY NO. 2 - To Negotiating Attorney

NAME OF CASE

DIVISION OR JUDICIAL DISTRICT

NAME AND ADDRESS OF EXPERT WITNESS

EXPERT'S FIELD

PREPARATION

\$ _____ Rate per day for _____ days

\$ _____ Rate per hour for _____ hours

Estimated time: _____ Days; or _____ Hours

\$ _____ Incidentel expenses: (Laboratory analyses, charts, etc.)

Specify _____

SUBSISTENCE (Check one)

- Included in the fees above.
- At the rate of \$ _____ per day (prorated by quarter days for fractional days)
- Actual expenses not exceeding \$ _____ per day (to be itemized on payment voucher)
- Other (Specify) _____

COURT ATTENDANCE

\$ _____ per day for _____ days; or

\$ _____ per hour for _____ hours.

TRANSPORTATION (Check appropriate box (es))

- Common carrier, at less than first-class accommodations
- Taxi fares to and from terminals.
- Privately owned vehicles at _____ cents per mile for travel of 200 miles or less, one way.
- Privately owned vehicle, not exceeding cost by common carrier at less than first-class rates
- Special conditions (Specify) _____

Number of round trips anticipated: _____

OTHER CONDITIONS (explain):

TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT.

The Contracting Officer, by written notice, may terminate this agreement, in whole or in part, when it is in the best interest of the Government. To the extent that this agreement is for services and is so terminated, the Government shall be liable only for payment in accordance with the payment provisions of this agreement for services rendered prior to the effective date of termination.

(Continue on reverse)

SIGNATURE (Government Attorney)	DATE	SIGNATURE (Expert Witness): I agree to perform the above service and appear as a witness on behalf of the Government.	DATE
NAME AND TITLE (Government Attorney)		NAME AND TITLE (Expert Witness):	

MARCH 19, 1984
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5-4.863 Pay Voucher

(Formerly Form 54, D.O.)
Form approved by
Comp. Gen., C.S.

ORIGINAL

DEPARTMENT OF JUSTICE

Bureau Vou. No.

Schedule No.

.....
(Bureau or Division)

PAY VOUCHER FOR SPECIAL SERVICES

TO
(Name of payee)

Address

.....
(To which checks should be mailed)

	PERIOD OF SERVICE Date	RATE PER	AMOUNT	
			Dollars	Cents
For SERVICES rendered as				
from, 19....., to, 19....., inclusive.				
On account of				
REMARKS:				
.....				
.....				
.....				
.....				

I CERTIFY that the above bill is correct and just and that payment has not been received.

(Sign original only)

Amount claimed	\$.....
Less differences (See attached)	\$.....
Employee withholdings (See reverse)	\$.....
Approved for payment	\$.....

Date Payee

I CERTIFY that the foregoing account is correct and proper for payment.

Date, 19.....
.....
(Authorized Certifying Officer)

ACCOUNTING CLASSIFICATION (Appropriation Symbol must be shown; other classification optional)

FORM 54-A-84
6-74

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NAME, GRADE, DESIGNATION, AND TOTAL SALARY RATE	GROSS AMOUNT EARNED	DEDUCTIONS							NET AMOUNT PAID	UNEMP. CO. CRANFORD PLAN NO. (IF REMARKS)
		Ret.	Federal Tax	Income Tax	FICA	STATE TAX	Group Life Ins	Health Benefits		

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U.S. GOVERNMENT PRINTING OFFICE: 1982-O-242-675 919-108

**UNITED STATES ATTORNEY'S MANUAL
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5-4.864 Contract for Appraisal Services

U.S. Department of Justice LM-116 (Ed. 5-24-71)	Land and Natural Resources Division
AGREEMENT FOR APPRAISAL SERVICES	
Date: _____	Name of Appraiser: _____
You are invited to submit a proposal to appraise the property hereinafter described in accordance with the following instructions and specifications. Execution of this instrument by you and submission to the Department of Justice within the time period provided herein will be considered your offer to appraise the property. In the event your proposal is accepted by the Department of Justice, this instrument will be executed by an authorized representative of the Department of Justice and will thereafter constitute the agreement of employment.	
PART I — INSTRUCTIONS	
Your proposal to appraise the property described herein must be submitted to the Department of Justice on or before _____.	
In the event of employment, four copies of the appraisal report must be submitted to the Department of Justice on or before _____.	
The interest acquired to be appraised is _____.	The property condemned, considering the interest acquired to be appraised is to be appraised as of _____.
The fee of the appraiser includes _____ days time which may be necessary as determined by the Department of Justice for preliminary discussions in explanation of the appraisal report.	
DESCRIPTION OF PROPERTY	
In the event circumstances arise which in the judgment of the Department of Justice make unnecessary the completion of the appraisal report, the appraiser will be paid a pro rata portion of the agreed fee based upon the amount of work completed at that time. <p>In addition to the preparation of the appraisal report in accordance with these instructions and specifications, the appraiser, upon request by the Department of Justice, agrees to attend conferences and to testify as an expert witness in support of his conclusions of value. For conferences prior to the trial, other than the time allocated for preliminary discussions in explanation of the report, the appraiser will be paid at the rate of \$ _____ per day (pro-rated) and for testimony at trial, the sum of \$ _____ per day (pro-rated). For attendance at conference or trial, if the site of the conference or trial is a distance of more than 25 miles from the appraiser's place of business, payment will be made for travel expenses from his place of business to the site of the conference or trial and return, in accordance with existing Government travel regulations. The appraiser will personally inspect the property condemned. Travel to and from the subject property for the purpose of said inspection will be at the cost of the appraiser. The appraiser will not employ any other experts or utilize any members of his staff or others to assist him in the preparation of the appraisal at additional cost to the United States, unless otherwise agreed to herein. In the event the Department of Justice determines it is necessary to update the appraisal from the date of valuation set forth herein to another date, the appraiser shall be paid on the basis of \$ _____ per day (pro-rated) for the number of days utilized by the appraiser to complete the assignment. The number of days requested by the appraiser to complete said updating is subject to the approval of the Department of Justice and shall be approved by the Department of Justice in advance of undertaking the assignment.</p> Visual aids to understanding of the appraisal, such as illustrative tables, graphs, charts, and maps will be prepared for the purpose of trial and according to specifications determined by the Department of Justice and at the cost of the appraiser, unless otherwise agreed to herein. <p>All information contained in the appraisal report to be made hereunder and all parts thereof will be treated as confidential and will not be divulged to anyone other than the Department of Justice or whomever the Department of Justice will designate. The appraiser, in preparation of the appraisal report, will follow current professional appraisal practices to determine fair market value (fair rental value). The appraisal shall be made in accordance with applicable law.</p>	
ADDITIONAL INSTRUCTIONS	
THE APPRAISER, _____, whose address is _____	
agrees to the terms and conditions herein and to make an appraisal to determine the (fair market value) (fair rental value) of the described property, in accordance therewith, for the fee of \$ _____ which is at the daily rate of \$ _____ The breakdown of the total fee is as follows (itemize estimated expenses):	
PROPOSAL ACCEPTED	
_____ Department of Justice	_____ Appraiser

Gen. & Stat.

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PART II — GENERAL SPECIFICATIONS OF REPORT	
<p>The report shall include the following items:</p> <p>Title Page:</p> <ol style="list-style-type: none">Name of owner(s)Street address or location of propertyName of individual making reportEffective date of appraisalAppraised value <p>2 Table of Contents.</p> <p>3 Letter of Transmittal.</p> <p>4 Photographs. Photographs of the property condemned and relevant comparable sales. On the back of the photographs will appear a statement identifying the property, the name and address of the photographer, the position and direction of the photographer in relation to the property, and the date the photograph was taken.</p> <p>5 Statement of the Estate Taken.</p> <p>6 Description:</p> <ol style="list-style-type: none">Legal description of property. In partial takings, a description of the total property before the taking and of the remainder.General description of the city and neighborhood where subject property located and general economic data concerning the same.Description of improvements on subject property.Site description. Soil, topography, mineral deposits of commercial value, etc.Description and physical condition of equipment considered realty. Also, general statement of items not considered part of realty for appraisal purposes.A schedule of existing leases, encumbrances, easements, etc., affecting the subject property on the date of taking. <p>7 Highest and Best Use. State the highest and best use of the property at the date of taking and in a partial taking the highest and best use of the property immediately before the taking and the highest and best use of the remainder immediately after the taking. Determination of highest and best use must be supported by market data.</p> <p>8 Assessed value and dollar amount of real estate taxes.</p> <p>9 Zoning of Subject and Comparable Properties. If there existed a reasonable probability that the subject property would have been rezoned at the time of the acquisition by the Government or in the reasonable future from said date, document by reporting other rezonings in the area and changed conditions indicating reasonable probability of rezoning. Set forth the indicated reasonable probable zoning classification.</p> <p>10 Impact of the Government Project. The impact of the Government project as it effects (fair market value) (fair rental value) in the area in which the subject property is located must be discussed in the report. The property will be valued as of the date of acquisition, excluding any enhancement or diminution in value by reason of the Government project. A determination that the project enhanced or depreciated values must be documented.</p> <p>11 Partial Takings. In the event of a partial taking of property in single ownership used as an economic unit, the before and after method of appraisal will be utilized,</p>	<p>unless otherwise instructed herein. The before value will exclude any enhancement or diminution in value by reason of the Government project and the after value will include any enhancement (benefits) or reflect any diminution (severance) by reason of the Government project. A determination that the remainder is enhanced or diminished in value by reason of the taking must be factually supported.</p> <p>12 Market Data — Comparable Sales. Comparable sales utilized must be confirmed by the buyer, seller, broker, or other persons having knowledge of price, terms and conditions of sale. Degree of comparability of each comparable sale to subject must be reported and a full description of each sale properly set forth. The land records must also be examined and any mortgages and encumbrances pertaining to each comparable sale must be reported. Any improvements or changes made in the sale property after the date of sale must be fully investigated and reported.</p> <p>13 Sales History of Subject Property. Sales history of subject property for at least 10 years preceding taking must be reported. Modernization or improvement of subject property for the 10 years aforementioned and the cost of same, if determinable, will be reported.</p> <p>14 Reproduction Cost. In the event the reproduction cost less depreciation plus land value method of appraisal is applicable, a complete breakdown of each item will be set forth including dimensions of the property, the source of costs, the physical, functional or economic depreciation, and comparable sales utilized to determine land value.</p> <p>15 Income Approach. If the income approach to value is applicable, each figure and factor used will be supported by factual data and reported. Capitalization rates, whenever possible, will be supported by reference to sales analyses of comparable properties with sufficient similarity and use. Actual income and expenses and vacancy experience of the subject property for 5 years preceding the taking must be reported. In the event estimated income and expenses are utilized for the purposes of capitalization, set forth the reason for disregarding the actual experienced income and expenses. Comparable leases to support the reasonableness of the rental utilized must be reported. The terms and conditions of said leases must be set forth. Data to support the expenses utilized must also be reported.</p> <p>16 Certification. The appraisal will be signed by the appraiser and will contain a certification that neither the appraiser nor any member of his family, or business associates had any undisclosed interest in the property, or any other property within the project area and that he has personally inspected the premises. The appraiser will further certify that he has not been employed to make an appraisal nor has he made any appraisal on any property within the project area for any party other than the United States, and that if this agreement is accepted, the appraiser will agree not to accept any assignment to appraise any property within the project area for any party except the United States, unless otherwise agreed to by the Department of Justice.</p> <p>17 Appraisal Qualifications. The appraisal report will include the appraiser's education, appraisal qualifications and experience.</p>

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5-4.866 Report on Condemnation Award or Verdict

FORM LBN-18 U.S. Department of Justice MAY 80 Land & Natural Resources Div.		Date:
REPORT ON CONDEMNATION AWARD OR VERDICT (To be submitted in triplicate)		DJ File No.:
Tried by:		Civil No.:
Trial attorney recommendation:		District:
Agency recommendation:		
TYPE OF PROPERTY TAKEN: <input type="checkbox"/> Residential <input type="checkbox"/> Industrial <input type="checkbox"/> Farm <input type="checkbox"/> Commercial <input type="checkbox"/> Other (specify)	NATURE OF ESTATE: <input type="checkbox"/> Fee simple <input type="checkbox"/> Easement <input type="checkbox"/> Term <input type="checkbox"/> Other (specify)	Tract No(s) : Acquiring agency:
Project:		
Date complaint filed:	Date DT filed:	Date service completed:
Date motion for new trial filed:		Date judgment entered:
By government <input type="checkbox"/> By defendant(s) <input type="checkbox"/>		
TRIAL DATA		
Date trial started:	Date trial ended:	RANGE OF TESTIMONY Government: From: \$ To: \$ Defendant(s): From: \$ To: \$
Actual trial days:	Award or verdict:	
Percentage above gov't high testimony:		
APPRAISERS UTILIZED BY GOVERNMENT		
Name of Appraiser		Witness (Excellent, Good, Fair, Poor)
APPRAISERS UTILIZED BY DEFENDANT(S)		
Name of Appraiser		Witness (Excellent, Good, Fair, Poor)
METHOD OF TRIAL (check one)		
<input type="checkbox"/> COMMISSION Names of Commission members:	<input type="checkbox"/> MAGISTRATE Name of magistrate:	<input type="checkbox"/> JUDGE Name of judge:
<input type="checkbox"/> JURY Date Commission appointed:	Objection to appointment: <input type="checkbox"/> By government <input type="checkbox"/> By defendant(s)	Date findings of facts and conclusions of law filed:
Date Commission's report submitted:	Date objections to report filed: <input type="checkbox"/> By government <input type="checkbox"/> By defendant(s)	
THE FOLLOWING ARE FOR COMPLETION BY DEPARTMENT PERSONNEL ONLY		
Reviewed by:		Remarks:

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5-4.867 Proposed Settlement of the Government's Liability

FORM OBD-43- MAY 80		U.S. Department of Justice	Date:
PROPOSED SETTLEMENT OF THE GOVERNMENT'S LIABILITY			D.J. File No.:
			Civil No.:
The following information is submitted (in tripli- cate) in connection with the proposed settlement of the Government's liability in the condemnation pro- ceeding noted.			Tract No(s).:
			Project:
			Agency:
TO: ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION			
FROM: _____ District _____			
_____ City _____			
ASSISTANT UNITED STATES ATTORNEY			
SUMMARY OF OFFER			
1. Offer (inclusive of interest - where revestment or removal of improvements is involved explain and give market and/or salvage value.):		2. Former Owner(s):	
		3. Landowners' Attorney:	
		4. Estate Condemned:	
5. Interests and Estate included in Offer (When offer does not include all interests, give details and justification.):			
6. Deposit:	7. Percent increase over Government's proposed high testimony:	8. In event of trial and a deficiency, interest runs from:	
DESCRIPTION OF LAND			
9. Date Complaint filed:		12. Use to which property was devoted:	
10. Date Declaration of Taking filed:			
11. Date Government granted possession:		13. Highest and best use:	
14. General location:	15. Number of acres: Taken: Remaining: _____ Total:	16. Nature of improve- ments:	

(N)

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17. VALUATION SUMMARY			
Government appraisers.....			
Amount of appraisal.....	\$ <u> </u>	\$ <u> </u>	\$ <u> </u>
Appraisal breakdown:			
1. Value of land taken.....	\$ <u> </u>	\$ <u> </u>	\$ <u> </u>
2. Value of improvements taken...	\$ <u> </u>	\$ <u> </u>	\$ <u> </u>
3. Severance estimate.....	\$ <u> </u>	\$ <u> </u>	\$ <u> </u>
4. Offsetting benefits, if any....	\$ <u> </u>	\$ <u> </u>	\$ <u> </u>
18. Owners' appraisal:	19. Owners' claim: :		
20. Setting or anticipated trial date:	21. Indicate type of trial expected (court) (jury) (commission):		
22. Deadline on acceptance of offer, if any:	23. Local representative of acquiring agency recommends (acceptance) (rejection). (Attach all agency recommendations.):		
24. Unusual legal or factual issues, if any: (Explain in detail.)			
APPRAISALS			
25. The following appraisals are attached:			
26. Appraisers who would be used as witnesses in event of trial: (If any appraiser will not be used as a witness, explain reasons.)			
RECOMMENDATION OF UNITED STATES ATTORNEY			
I recommend that the proposed settlement be (accepted) (rejected). A statement of my reasons for such recommendation is as follows:			
_____	_____		
Date	United States Attorney		

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5-4.868 Report on Settlement When Within Authority of U.S. Attorney

Settlement Form When Amount Within
Authority of United States Attorney

Form No. USA-155 U.S. Department of Justice (Rev. 1/18/71)		Date:
MEMORANDUM OF CONDEMNATION COMPROMISE SETTLEMENT Land and Natural Resources Division		District:
		State:
		DJ file no.:
		Civil No.:
		Tract or Parcel No(s).:
Style of Case: United States v.	Area:	
Former owner(s):	Acquiring Agency:	
Amount deposited with declaration of taking: \$		
Range of Government's testimony: \$ to \$		
Defendant's(s') claim, if known: \$ to \$		
Amount of settlement (inclusive of interest): \$		
AGENCY APPROVAL IN WRITING: (check) (Must be "yes" if settlement exceeds deposit)		Yes ___ No ___
Appraisal reports forwarded herewith: (Identify by name and date.)		
Deficiency check, if any: \$		___ Has been requested directly ___ You are requested to obtain
Remarks:		
	United States Attorney	
	Assistant United States Attorney	

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5-4.900 GUIDELINES, PROCEDURES, HANDBOOKS AND OTHER MATERIALS RELATING TO
LAND ACQUISITION CASES

5-4.910 Guidelines

5-4.911 Condemnation Guidelines Suggested by the United States Judicial
Conference

PRINCIPLES

I

A higher quality of justice to the parties
should be the primary objective.

Continued improvement in the administration of justice is needed to meet the increasing demands of our complex society on our court system. When the quality of justice can be appreciably improved by uniform guidelines designed to improve and expedite the processing to finality of federal land condemnation actions, it should be no answer that some reasonable mechanical effort by one or more of the parties may be required in order to simplify procedure and expedite judicial management of the case for the benefit of all concerned. This is in accordance with the most recent legislation of Congress on the subject, namely, Title 42, United States Code, Sections 4651 and 4655, inclusive, concerning uniform real property acquisition policy and practices, forbidding certain prior unjust practices, and requiring individual consideration for each landowner. Thus, the guidelines should serve the purpose of assisting in conservation of judicial time, the expediting of the judicial process, the removal of confusion and the enhancement of the quality of justice.

II

Fair and accurate statistical credit for
the judicial work performed should be assured.

The courts are considered for many of their critical needs on the basis of their statistics particularly those that apply to the number of cases filed and to the weighted caseload. Regardless of personal modesty or the indifference of any particular judge to receiving fair credit for his condemnation caseload, it is, nevertheless, important in the overall evaluation of the needs of the courts that fair credit be received in each instance.

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PROPOSED STANDARD GUIDELINES

Guideline 1

For each tract, economic unit or ownership for which the just compensation is required to be separately determined in a total lump sum, there shall be a separate civil action file opened by the clerk which shall be given a serial number, as given all other civil actions. For each such civil action, a separate J.S. 5 card shall be prepared on filing and a separate J.S. 6 card prepared on closing of each such separate civil action. The condemnor's counsel shall make the initial determination of each tract, economic unit or ownership for which just compensation is required to be separately determined in a lump sum, subject to review by the court after filing.

Guideline 2

The file in the civil action containing the first complaint filed under a single declaration of taking shall be designated as the Master File for all the civil actions based upon the single declaration of taking. The numerical designation as the Master File shall be shown by adding as a suffix to the civil action serial number the symbol MF _____. (In the blank shall be inserted a code number or numbers, selected by the condemnor, designating the project or projects and the number assigned the declaration of taking with which the property concerned is connected.) The single declaration of taking shall be filed in the Master File only. In all other civil actions for condemnation of property which is the subject of the declaration of taking, an appropriate reference to the Master File number in a standard form of complaint shall be deemed to incorporate in the cause the declaration of taking by reference and shall be a sufficient filing of the declaration of taking referred to.

For example, assuming that the civil serial number assigned to the first complaint under a single declaration of taking is C.A. 72-20,000, that the project number selected by the condemnor is 500 and the declaration of taking is the first in the project, the Master File Number would be C.A. 72-20,000-MF 500-1.

Guideline 3

For the civil action designated as the Master File, there shall be a separate complaint. At the option of the condemnor, this complaint and exhibits shall (1) describe all owners and other parties affected and all properties that are the subject of the declaration of taking, or

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(2) describe only the owner or owners of the first property or properties in the declaration of taking for which the issue of just compensation is separately determinable.

Guideline 4

In order to reduce administrative, clerical and secretarial work, a standard form of complaint (see USAM 5-4.801, *supra*), printed, photocopied, mimeographed or otherwise produced in numbers, may be used for each civil action filed to condemn a tract, economic unit or ownership for which the issue of just compensation is required to be determined in a single lump sum. In the body of the complaint it shall not be necessary to designate the owner or owners of the property concerned, other parties affected by the civil action, or to describe the property concerned in the civil action. The names of the owners and other parties affected and the description of the property concerned in the civil action may be set forth in an exhibit or exhibits incorporated by reference in the standard form of complaint and attached thereto.

Guideline 5

In any notice or process required or permitted by law or by the Rules of Civil Procedure (including but not limited to process under Rule 71A(d), Federal Rules of Civil Procedure), the condemnor at its option, may combine in a single notice or process, notice or process in as many separate civil actions as it may choose in the interest of economy and efficiency. (See USAM 5-4.804, *supra*.)

Guideline 6

A district court should adopt a local rule or general order to the effect that the filing of a declaration of taking in the Master File constitutes a filing of the same in each of the actions to which it relates.

NOTE: An essential element of the Master File system is that the filing of the declaration of taking in the Master File shall constitute a filing of the same in each of the separate actions to which the Master File relates. This is of particular significance because the Declaration of Taking Act, 40 U.S.C. §258a, specifies filing of the declaration of taking "in the cause." If the filing of the declaration of taking is defective, the vesting of the title to the subject property in the United States under the Act is jeopardized. To ensure that the filing of a pleading in the Master File will legally constitute a filing in the several related actions, it is considered necessary that each district

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court, as part of the implementation of this system, adopt a local rule of procedure giving the desired effect to the filing of pleadings in the Master File. The following language for such a rule is suggested:

Where the United States files separate condemnation actions and a single declaration of taking relating to those separate actions, the clerk is authorized to establish a Master File in which the declaration of taking may be filed, and the filing of the declaration of taking therein shall constitute a filing of the same in each of the actions to which it relates.

Guideline 7

A district court may adopt a local rule or general order that, unless otherwise ordered, all issues of just compensation involved in a single declaration of taking shall be consolidated for a joint hearing and trial.

CONCLUSION

Since the Department of Justice is voluntarily cooperating with the courts in seeking an appropriate and workable solution on the subject to the end that the administration of justice will be both improved and expedited, the district courts, in return, should be careful not to apply these guidelines in any particular situation so as to unnecessarily burden the Department of Justice. These guidelines should be applied so as to expedite justice to all parties.

5-4.912 9-Point Program for Settlement or Dismissal Within One Year

The following specific suggestions for a procedural program are designed to aid in securing the settlement or trial of a condemnation action within one year of its institution:

A. Inspect the property as soon as possible. There is no substitute for thorough knowledge of the property for either settlement negotiations or trial purposes.

B. Promptly request continuation of title evidence (see USAM 5-4.533, supra and USAM 5-4.927, infra) to the date of recordation of declaration of taking, judgment on declaration of taking or lis pendens, and, if you have difficulty in obtaining such evidence, request assistance from the Department.

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C. Review agency appraisals within 10 days. Satisfy yourself both as to the adequacy of the appraisal report and of the ability of the appraiser to be an effective witness. Appraisal reports must, of course, be updated to reflect valuations as of the date of taking. This will supply trial counsel with current information concerning the case, will enable him/her to determine whether an additional appraisal is necessary, and will put him/her in a position to conduct meaningful settlement negotiations or be ready for trial. When further appraisal services are deemed necessary, promptly submit a Form OBD 47, together with executed Forms USA-157 and LN-11 (USAM 5-4.864, supra), if fee is over \$2,500, for that purpose. If a proposed fee of \$2,500 or more for appraisal services is submitted by an appraiser, proposals from two other qualified appraisers must be obtained whenever possible. In the event some of the printed instructions on Form LN-116 (USAM 5-4.864, supra) are not pertinent, they may be deleted. When and if approved, a copy of this agreement will be forwarded to the U.S. Attorney and to the appraiser, at which time the work may proceed. The last copy of this package agreement is to be retained by the appraiser for his/her records. See USAM 5-9.100 et seq., for information as to the preparation and review of appraisals by personnel of the offices of the U.S. Attorneys, the Land and Natural Resources Division, and the acquiring agencies.

D. Commence serving parties or publishing against them within 30 days of the receipt of the continuation title evidence. Personal service should, of course, be effected whenever possible. Service or publication should be completed within 60 days. (See USAM 5-4.525, supra, and USAM 5-4.925, infra.)

E. Advise the Department of important legal issues within 30 days or as soon as they develop after that time. The Department has, indexed and readily available, many briefs and memoranda of law covering legal issues which have developed in condemnation cases, and the Department is willing to undertake research on other issues; but it must first be informed of the problems which you have encountered before it can be of maximum help to you.

F. Service or publication should be completed within 60 days.

G. There should be a thorough exploration of settlement possibilities within 90 days. Use your settlement authority to the fullest extent possible. Outside of direct purchase, which the acquiring agencies have been urged to accomplish whenever possible, amicable settlement represents the quickest and most satisfactory way for a government to acquire privately owned property. (See USAM 5-4.630, supra, and USAM 5-4-925, infra.)

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H. Wherever local practice and the condition of court calendars will permit, a pre-trial should be held within six months. In addition to resolving preliminary matters, such as discovery, objections to the taking, motions, methods or trial, etc., a pre-trial setting necessitates an examination of positions and frequently acts as a spur to serious settlement negotiations. A later pre-trial, or even pre-trials, may prove to be necessary if the case is to be tried on its merits.

I. Trial should be set within a year. If circumstances beyond your control preclude this, then the earliest possible trial setting should be sought.

5-4.913 Policy Regarding Consent To Trial of Condemnation Cases by United States Magistrates

The Federal Magistrate Act of 1979 (Pub. L. 96-82) authorized United States Magistrates to conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specifically designated to exercise such jurisdiction by the district court or courts he/she serves, provided the parties consent thereto. The Act preserves to the parties the right to appeal as from a judgment of the district court.

This Division is favorably disposed to the use of United States Magistrates to conduct the trial of condemnation cases and to enter judgment therein whenever, in the opinion of the responsible attorney, consent to such trial would be in the litigating interests of the United States. Because of the very large number of condemnation cases pending throughout the country and the difficulty generally experienced in obtaining trial time for these cases, the option of consensual trial by magistrate provides an effective means of expediting the disposition of condemnation cases in appropriate circumstances.

Accordingly, it is the policy of this Division to encourage, in appropriate cases, consent to the conduct of condemnation trials by United States Magistrates if the attorney in charge of the case determines that trial before a magistrate would be in the litigating interests of the United States. In making this determination (on an individual case basis), all relevant factors should be considered, including the complexity of the case, the relief sought, the amount involved, the importance and nature of the issues raised, and the likelihood that the referral of the case to the magistrate will expedite resolution of the litigation. The attorney in charge of the case should similarly determine whether the consent should be to a trial by the magistrate or by a jury presided over by the magistrate.

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The Federal Magistrate Act of 1979 provides that where a magistrate is designated to exercise civil litigation jurisdiction, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. In many districts, however, there are backlogs of condemnation cases that were filed before the October 10, 1979 enactment of the Act for which such notification has not been given by the clerk. Accordingly, this Division urges the responsible attorneys to review their cases and determine which, if any, are appropriate for trial before a magistrate and that such action as necessary and appropriate be taken to notify the parties thereto of their right to consent to the magistrate's exercise of litigation jurisdiction.

5-4.920 Condemnation Procedures - Filing and Serving Complaints

5-4.921 Materials to be Secured From Acquiring Agency By United States Attorney Upon Being Authorized to Institute Action

Upon the receipt of a request to institute condemnation proceedings, the U.S. Attorney shall request the following from the local office of the acquiring agency:

A. A check for the amount of the estimated compensation, in those cases where a declaration of taking is to be filed, if a check was not transmitted with the request to institute the proceedings;

B. A sufficient number of copies of the property description of the condemned land;

C. If the description of the estate condemned is lengthy, a sufficient number of copies of the description (this often is desirable in easement cases); and

D. Such title evidence as is presently available. (See USAM 5-4.530, supra.)

This description of the estate and of the land condemned, referred to in B and C above, may be attached as exhibits to and incorporated as a part of the complaint, the notice of condemnation, and other orders and pleadings, where deemed necessary, in order to avoid the necessity of retyping such descriptions, with consequent chance for error. These descriptions usually will be mimeographed upon request to the acquiring agency.

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5-4.922 Documents to be Prepared By United States Attorneys Prior to Filing Condemnation Actions

After receiving the material described in USAM 5-4.921, supra, the U.S. Attorney shall prepare:

A. Complaint in condemnation (see Rule 71A(c), Fed. R. Civ. P. and USAM 5-4.801 or 5-4.802, supra). The complaint in condemnation must not vary in form or substance from any instructions given by the Department and, if there is any variance, the Department must be advised at once of such changes and the reasons therefor;

B. Clerk's receipt if a declaration of taking is to be filed showing the deposit of estimated compensation;

C. Motion and order for delivery of possession, if requested by the Department (see USAM 5-4.526, 5-4.817, 5-4.827, supra);

D. Notices of condemnation for service upon defendants (see Form 28, Fed. R. Civ. P., or USAM 5-4.804, supra);

E. Lis pendens notice, if necessary (see USAM 5-4.524, supra); and

F. Form letters to purported owners notifying them of the proceedings and of their right to withdraw the deposit, upon proof of ownership (see USAM 5-4.805, supra).

5-4.923 Procedures in Filing Complaints in Condemnation

After all the documents listed in USAM 5-4.922, supra are prepared, the U.S. Attorney should:

A. File the complaint (see USAM 5-4.801 or 5-4.802, supra) and the declaration of taking, if one has been furnished;

B. In cases where a declaration of taking is filed, deposit the check for the estimated just compensation in the registry of the court, and have the clerk execute the clerk's receipt in duplicate;

C. When requested, file a motion for order for delivery of possession (see USAM 5-4.817, supra), and present an order for delivery of possession (see USAM 5-4.827, supra) to the court as soon as possible (depending upon local practice and the circumstances of a given case, a hearing on such a motion, after notice and service, may be required, especially where the condemned tract is not vacant land);

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D. Deliver to the clerk, or hand to the United States Marshal (depending on local practice), a notice of condemnation, see USAM 5-4.804, supra, or for each defendant unless he/she has executed a waiver of service, see USAM 5-4.836, supra. (Two copies of each such notice will be required; one copy for service on the defendant and one copy which the United States Marshall will make his/her return.);

E. Record in the local land records the lis pendens, a copy of the declaration of taking or a copy of the judgment on declaration of taking, as provided in USAM 5-4.524, supra;

F. If an order for delivery of possession (see USAM 5-4.827, supra) has been entered, hand two certified copies of such order for each defendant to the U.S. Marshal, one for personal service and the other for the Marshal's return;

G. If a declaration of taking has been filed, mail a form letter (see USAM 5-4.805, supra) to each defendant.

5-4.924 Procedures in Continuing Title Evidence

It is the general practice in condemnation cases for the acquiring agency to furnish the Department with the preliminary evidence of title to land. (Information with respect to acceptable types of evidence of title is set for the Standards for the Preparation of Title Evidence in Land Acquisition by the United States, USAM 5-15.000.) This preliminary evidence of title will necessarily predate the institution of proceedings, often by a substantial period. For purposes of instituting suit, the preliminary evidence of title may properly be relied upon for identification of those persons to be joined as original defendants. But prior to the distribution of any funds of deposit, settlement of the claim, or judicial determination of just compensation, the evidence of title must be continued to a time immediately subsequent to the commencement of notice by recordation of lis pendens, declaration of taking or judgment thereon to disclose the state of title at the time. Based upon the information disclosed by the continuation of the evidence of title, any additional parties shown to have, or who may claim to have, any interest in the property involved must be joined as defendants in the case and any changes in the naming of necessary and proper parties defendant must be effected (see USAM 5-4.531, supra).

To continue the title evidence after the institution of an action, the U.S. Attorney shall request the local office of the acquiring agency to furnish:

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A. Title evidence, properly extended to a date subsequent to the time of filing the complaint in condemnation, in those states where such filing constitutes notice; or to the time of recordation of either a lis pendens notice, a declaration of taking, or a judgment on declaration of taking. See USAM 5-4.524, supra.

B. Copies of options, if any, on the land acquired. See USAM 5-4.523, supra; and

C. Certificates as to parties in possession and mechanics' liens claims (see USAM 5-4.831, supra), dated immediately following the recordation of the lis pendens notice or the declaration of taking.

Upon receipt of the title evidence, duly extended, and certificates as to parties in possession and mechanics' liens, the U.S. Attorney shall:

A. If the description of the property in the title evidence differs from that in the declaration of taking, request that the title evidence be amended or obtain a statement that the land examined by the title examiner is the same as that described in the declaration of taking;

B. Examine the title evidence and such certificates to determine the persons having a possible compensable interest who should be joined as parties defendant:

1. When joining unknown heirs and devisees of a deceased person, or any other persons having an apparent interest whose names cannot be ascertained, always add "unknown owners" as parties defendant; and

2. Always join the state as a party defendant when you have named as parties defendant heirs in an unprobated estate, who are expected to share in the award. This is to clear inheritance tax liability which must be satisfied;

C. If any parties are found by the title search to have an interest in the property who were not joined in the original complaint, prepare and file a pleading by which they may be joined as parties defendant. This may be accomplished by:

1. A motion and order to add additional parties (see USAM 5-4.811, supra);

2. A supplemental complaint to add parties; or

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3. An amendment to the complaint to add parties (see USAM 5-4.809, supra);

D. Where a party dies or becomes incompetent, move for a hearing on a motion to substitute parties as provided by Rule 71A(g), Federal Rules of Civil Procedure, and effect service on the necessary parties as provided in USAM 5.4.340 et seq., supra. As to transfers of interest, however, see the Anti-Assignment Act, 31 U.S.C. §203, and United States v. Dow, 357 U.S. 17;

E. Obtain appropriate service of notice upon additional parties in the same manner as parties named in the original complaint in condemnation (see USAM 5-4.525, supra and USAM 5-9.925); and

F. Request a current tax statement from the applicable taxing authorities (see USAM 5-4.834, supra) and a current statement from other lienholders (see USAM 5-4.835, supra) and take steps to see that all taxes and assessments which are a lien as of the date of taking are satisfied either by payment out of the deposit or by requiring the landowner to furnish a receipt or other evidence of payment.

5-4.925 Procedures in Serving Notices of Condemnation

A. Personal Service. Personal service of the notice of condemnation (see USAM 5-4.804, supra) must be made under Rule 71A(d)(3), Federal Rules of Civil Procedure, upon any defendant whose residence is known who resides within the United States or its territories or insular possessions. The United States Marshal for the district in which the defendants reside should be requested to make personal service upon defendants living outside the territorial limits of the court in which the case is pending. A sufficient number of copies of the notice should be furnished the United States Marshal for service upon defendants, for the return of service pursuant to Rule 4(q), Federal Rules of Civil Procedure, for the United States Marshal's files and for use by government counsel in charge of the case. In jurisdictions in which notices are served on defendants immediately after the filing of the case, such notices should be accompanied by a statement showing the amount deposited as estimated just compensation, the procedure to be followed in obtaining disbursement of the funds, and other helpful information that will facilitate the disposition of the case. See form letter, USAM 5-4.805, supra.

B. Service by Publication. The same form of notice is used for service by publication as for personal service (see USAM 5-4.804, supra). If constructive service is required:

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1. Prepare certificate for service by publication (see USAM 5-4.818, supra);

2. Arrange for its publication in the manner provided by Rule 71(A)(d)(3)(ii), Federal Rules of Civil Procedure; and

3. Only those not personally served need be named and the notice to be published should contain only the shortest legal description sufficient to identify the property.

When publication has been completed:

1. Obtain from the publisher the required proof of publication, and

2. Prepare the certificate of publication (see USAM 5-4.819, supra) and mailing as required by Rule 71(A)(d)(3)(ii), Federal Rules of Civil Procedure.

C. Service Upon Minors and Incompetents

Minors and incompetents are served in the manner prescribed by the law of the state. It will often be necessary to secure the appointment of and effect service upon guardians ad litem. The appointment of and service upon attorneys ad litem is necessary for those in the Public Health Service on duty with the Armed Forces (see USAM 5-4.525, supra).

When personal service has been completed and publication of constructive service has been commenced, a copy of the actual published notice, accompanied by the United States Marshal's returns of all persons served with summons and a list of those defendants whose appearances have been entered, should be forwarded to the Department.

5-4.930 Condemnation Procedures - Prosecution of Actions

5-4.931 Responses to Challenges of a Taking

A. Insufficient Defenses.

If the answer filed by a defendant contains allegations or contentions which are insufficient as a matter of law, or objections to the taking which are not timely filed (see USAM 5-4.541, supra):

1. File a motion to strike on behalf of the government; and

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2. Have such motion set down for an immediate hearing, if necessary.

B. Challenge of Right to Take.

If the answer filed by a defendant raises the issue of the government's right to take the property, or a motion is filed by the defendant to dismiss the proceeding or to vacate the declaration of taking or the order for delivery of possession:

1. If time permits, the answer or motion should be sent to the Department for comment before filing a responsive pleading;

2. Otherwise, file a motion to strike on behalf of the government. (N.B. Berman v. Parker, 348 U.S. 26; United States v. Carmack, 329 U.S. 230);

3. In lieu of a motion to strike, you may file a motion for summary judgment and/or judgment on the pleadings as to the right of the government to condemn the property in question; and

4. Have the motion set for a hearing, if necessary, at the earliest possible date.

C. Notice to the Department.

The Department must be notified promptly of the outcome of all hearings and arguments upon such motions, and you should send two copies of the following instruments to the Department:

1. Answer of the defendant;

2. Motion to strike (or other appropriate motion) if filed on behalf of the United States, and any memorandum of law filed in support thereof; and

3. Order of the court ruling on such motion.

5-4.932 Procedures for Excluding or Dismissing Land From Condemnation Proceeding

If authorization is received from the Department for the exclusion or dismissal of land from a proceeding, the U.S. Attorney shall:

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A. If a declaration of taking has been filed, endeavor to stipulate (see USAM 5-4.813, supra) with the former owners, pursuant to 40 U.S.C. §258(f), for the exclusion of such property from the proceeding and the reversion of title thereto in the former owners. (Absent a stipulation, no reversion is possible.) The stipulation should waive, as to any lands so excluded or dismissed, any claims to costs or attorneys' fees by reason of the proceeding. See Section 304(a) of Pub. L. 91-646, approved January 2, 1971, 84 Stat. 1906. (See USAM 5-4.558, supra.) The stipulation should provide for the return of the estimated compensation for such reversioned property to the United States. If the government had possession of the property for a period of time, the stipulation should fix the amount of compensation for the period of such occupancy, or specifically include a waiver for such temporary use and occupancy or for damages resulting from the institution of the proceedings. If no agreement is reached, a hearing as to compensation due, if any, will be necessary. See USAM 5-4.941, supra.

B. If no declaration of taking has been filed, dismiss the property in question from the proceedings, pursuant to Rule 71A(i), Federal Rules of Civil Procedure. See USAM 5-4.813, supra, unless otherwise instructed by the Department.

5-4.940 Condemnation Procedures--Just Compensation, Determination and Payment

5-4.941 Procedure for Ascertainment of Just Compensation

When service has been completed, the case should be prosecuted to a speedy conclusion in order to reduce the amount of interest on any award in excess of the amount which has been deposited in court. Prompt action should be taken to conclude the case by settlement, either on the basis of an option (see USAM 5-4.523, supra) or a compromise offer (see USAM 5-4.620 et seq., supra) or by having the case set for an early trial on the issue of just compensation.

A trial setting should be delayed only if settlement is imminent. If a settlement agreement appears unlikely, set the case for trial as soon as possible.

A. The Department must be advised, as far in advance thereof as possible, concerning all dates of hearings, trials, or arguments, including continuances thereof.

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B. Rule 71A(h), Federal Rules of Civil Procedure, authorizes the court when a jury has been demanded to appoint a commission instead of a jury to try the issue of just compensation when certain conditions prevail. (Note that the forms of complaint contained in USAM 5-4.805, supra, and USAM 5-4.806, supra, contain a request for a jury which may be deleted except in the cases set out at USAM 5-4.551, supra.) In respect to reference to a commission, except as to tracts included in a small tract program (see USAM 5-4.913, supra), and other tracts involving no unusual legal problem or substantial value, the procedure set out should be followed:

1. If a motion for reference to a commission is filed by a defendant or if the court indicates that he/she is considering the appointment of commissioners, you should immediately notify the Department of this fact, together with your recommendations as to whether objections should be made to the appointment of a commission, and await instructions;

2. If the court appoints a commission on its own motion, immediately notify the Department and give your recommendation as to whether or not objections should be filed to the order of the court. If possible, no objections should be filed to an order appointing a commission without first obtaining the approval of the Department;

3. If, in your opinion, a commission should be appointed in a case, notify the Department to that effect and await instructions before requesting the appointment of a commission; and

4. If a commission is appointed, submit a request to incur the expense of USA-41 (see USAM 5-4.861, supra), accompanied by the order of the court appointing the commission and setting fees for the commissioners. Fees for commissioners are controlled by Pub. L. 94-41, H.J. Res. 499, June 27, 1975, and limited to the daily rate allowed a GS-18.

5-4.942 Procedure for Retaining Services of an Independent Appraiser

A. A request to the Department to retain the services of an independent appraiser should be submitted on Form CBD 47, and should indicate:

1. The amount to be paid the expert for an appraisal in a lump sum (however, you should show the estimated number of days required for such appraisal); or

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2. The rate per diem and the estimated number of days necessary to prepare the appraisal.

B. Submit a separate Form OBD 47 for each such appraiser which includes his/her fee for conferences with you in preparation for trial and for testifying at trial, generally on a per diem rate, giving the anticipated number of days required for such purposes. If it is anticipated that such conferences and trial will not occur during the current fiscal year, do not submit an OBD 47 for these services until after the end of the current fiscal year, as funds otherwise will be set aside for such purpose which could be used for other purposes during the fiscal year. The expense must be justified. See USAM 5-9.231, supra.

C. If the services of the appraiser, previously authorized, will not be utilized, in whole or in part, immediately notify the Department, so obligated funds may be released.

D. When an independent appraiser is to be retained, you should be sure that his/her appraisal is made before improvements have been removed or the condemned property is otherwise altered.

E. To insure efficiency in incurring appraisal and expert witness expenses:

1. Secure adequate appraisals from the acquiring agency;
2. Incur expenses only where necessary; and
3. Negotiate a fair price for appraisers' services.

F. Upon receipt of appraisal data;

1. Examine appraisals carefully; and
2. As necessary, arrange for consultations and viewing of the land with the appraiser.

G. If the acquiring agency has agreed to reimburse the Department for the cost of obtaining the services of the independent appraiser, then the usual pay voucher should be submitted to the United States Marshal's office for payment. In support of the voucher, the bill of the appraiser and a copy of the reimbursement agreement from the acquiring agency should be submitted with a cover memorandum advising the United States Marshal that a copy of these documents should be submitted to Financial Manager, Executive Office for U.S. Attorneys, Room 1618, Main Building, who will contact the acquiring agency to obtain reimbursement.

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5-4.943 Procedure for Distribution of Funds Deposited in Court

Funds deposited with the declaration of taking and any funds thereafter deposited in court should be promptly distributed. To this end, the U.S. Attorney should:

A. Obtain promptly and review all information available as to the state of the title to the property and any liens, taxes, and encumbrances thereon.

B. Advise the defendants or their counsel by letter (see USAM 5-4.805, supra) of the fact that funds have been deposited in court, and offer all possible assistance in obtaining the disbursement of such funds. Suggested forms for use in processing such disbursements are set out at USAM 5-4.814, 5-4.815, 5-4.824, and 5-4.825, supra. By this procedure the landowner makes written application through the U.S. Attorney, who makes an appropriate motion to disburse, attaching the defendant's sworn application. The court may enter its order either with or without a formal hearing.

1. If the former owner's title is clear and unencumbered all of the funds deposited may be disbursed to him/her.

2. If the title is encumbered, sufficient funds should be retained in the registry of the court to pay all liens on the property and to satisfy claims of any third persons whose interest is disclosed by the title evidence.

3. If additional funds are deposited pursuant to a deficiency judgment, the defendants should be advised when the funds are available for withdrawal.

4. When funds cannot be disbursed because the owner cannot be located, or for other reasons, an order should be sought immediately requiring the clerk to disburse the undistributed balance to the Treasury of the United States at the expiration of the five-year period pursuant to 28 U.S.C. §2042. One certified and one uncertified copy of the order should be transmitted to the Department, together with two copies of the certificate of deposit showing the deposit in a federal depository. See USAM 5-4.555, supra.

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5-4.944 Procedures in Moving for a New Trial or Objection to a
Commission's Award

If trial has been to a judge or jury, and the award or verdict materially exceeds the government's testimony:

A. In proper cases entry of judgment should be delayed, if possible, in order to obtain additional time within which the Department may consider a motion for a new trial.

B. Within ten days after entry of judgment, or such additional time as allowed by the court, file a motion for a new trial, unless instructed otherwise, setting forth with particularity all grounds for the motion.

C. Prepare and file a brief on the motion and arrange for a hearing thereon.

If the trial was held before a commission, resulting in an award which materially exceeds the government's testimony:

A. When the report of the commission is filed with the clerk of the court, submit to the Department a copy of the report and your recommendations as to filing objections and exceptions to the award.

B. If objections are to be filed they must be filed within ten days from the date the report is lodged with the clerk and Rule 6(b), Federal Rules of Civil Procedure, requires that they be full and complete and state specifically the grounds therefor. See United States v. Merz, 376 U.S. 192; Morgan v. United States, 356 F.2d 17 (8th Cir.). The objections cannot be amended later to include additional grounds. Exceptions must be specifically directed to defects, such as failure to disclose how the commission came to its dollar figure, what weight it gave to a particular witness or a particular sale, etc. Most important is explicit detail as to how basic disputes were resolved. In most cases, the disputes turn on a few items, for example, value of bottomland, extent of cultivable acreage, degree of flooding before the taking, or severance damage. Exceptions should demand detailed findings in each such regard.

C. Extension should be obtained to give time for consideration by the Department of:

1. The necessity for obtaining the transcript; or
2. The advisability of filing objections.

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D. If objections are filed, prepare and file a brief in support thereof, and arrange for a hearing.

E. If the court refuses to extend the time within which to prepare and file adequate objections which appear to be warranted, prepare and file such objections and immediately advise the Department.

If the motion for new trial is granted or the objections to the award are sustained:

A. Send one certified and one plain copy of the order of the court to the Department;

B. Proceed with a new trial or other action directed by the court as expeditiously as possible;

C. Advise the Department of the results.

5-4.945 Procedures in Securing a Check to Satisfy Deficiency Judgment

Upon the entry of judgments fixing compensation and ordering the deposits of deficiencies:

A. In acquisitions for the Department of the Interior, General Services Administration and for the Department of the Navy, if the judgments are satisfactory and acceptance of the award has been approved by the local authorized representative of the agency, send one certified copy and one plain copy of the judgment to the designated local representative with a request for a check in satisfaction of the deficiency, and send one certified and one plain copy of the judgment to the Department of Justice.

B. In acquisitions for the Departments of the Army and Air Force, if the judgment is not in excess of the highest testimony of the valuation witness for the government or in cases where there are stipulated judgments, send one certified copy and two plain copies of the judgment to the local District Engineer with a request for a check in satisfaction of the deficiency, and send one certified and one plain copy of the judgment to the Department of Justice.

C. In acquisitions for all other agencies:

1. Send one certified copy and three plain copies of the judgment to the Department; and

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2. Request that the check be obtained.

5-4.950 Procedures for Processing Settlement Offers

5-4.951 Procedure With Respect to Processing Settlement Offers

If a settlement offer is received, the U.S. Attorney should:

A. Ascertain in writing the views of the local office of the acquiring agency;

B. Formulate his/her own views of the offer, based upon the compatibility of the amount of the settlement with the sound appraisals upon which the government would rely as evidence in the event of trial, having due regard for probable minimum trial costs and risks.

5-4.952 Settlement Offer Within Authority

If the settlement offer is within the authority of the U.S. Attorney (see USAM 5-4.630, *supra*) and he/she and the representative of the acquiring agency both believe that it should be accepted, the U.S. Attorney should:

A. Draft and have executed a stipulation between the United States and the defendants in question (see USAM 5-4.816, *supra*). The stipulated amount should be inclusive of interest;

B. Have judgment entered on the stipulation (see USAM 5-4.826, *supra*). The judgment should provide for a setoff against the agreed compensation for any improvements or timber removed from the premises under agreement with the former owner. If no deficiency deposit will be required, the judgment should be prepared in seven copies: two for the Department (one certified and one plain), one for the U.S. Attorney's office, one for the acquiring agency, one for the defendant, and the original and one copy for filing;

C. If a deficiency deposit is required, request a check for such deficiency from the District or Division Engineer in Army, Air Force, AEC or NASA cases, the district Public Works Officer or the Regional Office of the Bureau of Yards and Docks in Navy cases, the Regional Commissioner in General Services Administration cases and the local representative in Department of the Interior cases. A copy of the request together with

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two copies of the judgment should be submitted to the Department. The request is made through the Department in cases instituted on behalf of other agencies. For number of copies to be forwarded, see USAM 5-4.945, supra;

D. Submit a prompt report of the settlement to the Department, using Form USA-155 (see USAM 5-4.868, supra), or furnish such information by letter;

E. The judgment (see USAM 5-4.826, supra) fixing compensation should direct that distribution be made of the award; if it does not, prepare a motion and order for distribution (see USAM 5-4.815, and 5-4.824, supra);

F. If no declaration of taking has been filed a final judgment should be entered after the judgment fixing compensation has been satisfied by payment, reciting that fact and vesting title in the United States. If a declaration of taking has been filed, the judgment should confirm title in the United States; and

G. Send the Department one certified and one uncertified copy of the stipulation (see USAM 5-4.816, supra) and judgment (see USAM 5-4.826, supra) thereon (send additional copies of the judgment, as specified at USAM 5-4.945, supra), together with all title evidence, the certificate of inspection and possession (see USAM 5-4.831, supra), and the receipt of the clerk, in duplicate. If a final judgment has been entered, as indicated in F above, one certified and one plain copy should be furnished the Department.

5-4.953 Settlement Offer Exceeds Authority; Lack of Agency Concurrence

If the offer of settlement exceeds the U.S. Attorney's delegated authority (see USAM 5-4.630, supra) or the acquiring agency does not concur in the proposed settlement, the U.S. Attorney should:

A. Submit the offer to the Department for consideration on Form OBD 43 (see USAM 5-4.867, supra);

B. Submit his/her recommendation, with the reasons therefor in detail;

C. Submit a history of negotiations had with the land owners or their counsel prior to reaching the final figure proposed;

D. Advise of the recommendation of the local office of the acquiring agency and the same time request the local representative of the acquiring

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agency immediately to forward his/her recommendation through proper channels to Washington;

E. Forward all appraisal reports relating to the tract to the Department at the same time;

F. Advise what witnesses would be used in the event of trial and the amount of their anticipated testimony;

G. Advise the probable range of the defendant's testimony of value, if known, or the amount claimed, if known; and

H. Furnish any other information which would be helpful in considering the acceptability of the offer, including any unusual legal or factual issues involved, experience in other trials, whether the government appraisers have proved to be good witnesses, etc.

5-4.954 Finalizing Settlement

If Departmental authorization is received to accept the offer, the U.S. Attorney should:

A. Enter into a stipulation with the defendants involved (see USAM 5-4.813, supra);

B. Procure any necessary disclaimers (see USAM 5-4.833, supra) waivers of compensation or other releases needed to clear up title objections, including affidavits of heirship;

C. Use show cause procedure (see USAM 5-4.855, supra) to get parties into court on conflicting claims to share in the distribution of the award. The government has no part in these disputes, but should assist the court and take the initiative in order to expedite closing the case;

D. Have judgment entered;

E. Request a deficiency check, if necessary, as indicated at USAM 5-4.945, supra;

F. If a final judgment vesting title in the United States is required, it should be entered; and

G. Send the closing papers to the Department as indicated in USAM 5-4.516, supra.

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5-4.960 The Appraisal Unit

5-4.961 Area of Responsibility

The Appraisal Unit assists the Land Acquisition Section in advising the Department's divisions or bureaus, and other agencies of the government, with respect to all matters relating to the evaluation of real and personal property. In particular, the Unit handles questions of appraising for just compensation as it relates to the law of federal land acquisition. The Unit's analyses of appraisal reports result in settlement recommendations in condemnation cases and critiques as to the adequacy of appraisals for support of just compensation, or for use in trial. It furnishes recommendations as to the approval or disapproval of the employment of appraisers and the amount of appraisal fees to be obligated by the Department. The Appraisal Unit also assists the personnel of the Land and Natural Resources Division, as well as U.S. Attorneys and field attorneys, and acquiring agencies, in arranging for the employment of expert witnesses, such as appraisers, engineers, hydrologists, etc., who are required to participate in establishing just compensation for land or property being acquired by the United States or in defending claims against the United States involving real or personal property. The employment by the Land and Natural Resources Division of such experts and their remuneration, as well as the manner in which appraisals are made and reports are to be prepared, are referred to the Unit for review and approval.

In their role as in-house valuation experts of the Land and Natural Resources Division, the members of the Appraisal Unit are, when requested, prepared to confer with the U.S. Attorneys in the field, inspect properties and assist in any case or situation wherein their services are needed or desirable.

5-4.962 Analysis of Appraisal Reports by United States Attorneys

Appraisals supplied by an agency to a U.S. Attorney in support of a request to condemn a tract of land should be reviewed as soon as the case is received. In this regard, the U.S. Attorney should satisfy himself/herself that he/she has received all of the appraisals, whether approved or disapproved, from the acquiring agency. He/she should also insist that the review memorandums containing the critique of the appraisals and recommendations of the acquiring agency be forwarded with the appraisals. Where there is doubt in the U.S. Attorney's mind regarding the adequacy of any appraisal report, or if large sums of money are involved, the

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appraisal reports should be forwarded to the Land Acquisition Section which will request the Appraisal Unit to furnish an analysis and recommendation. It is important that the U.S. Attorney act upon the Appraisal Unit's recommendations and do so in a timely manner. This will insure that sound and proper appraisals are at hand for early settlement negotiations or for trial purposes.

For further information with respect to the processing and review of appraisal reports by personnel of the office of the U.S. Attorney, the Land and Natural Resources Division, and the acquiring agencies, see USAM 5-4.982 Uniform Appraisal Standards for Federal Land Acquisition, and 5-4.981 A Procedural Guide for the Acquisition of Real Property by Governmental Agencies at page 7 and pages 57-59, respectively.

5-4.963 Obtaining Additional Appraisals

The U.S. Attorney should not obtain an additional appraisal report until the existing appraisals have been analyzed by the Appraisal Unit and its recommendations received. Generally, an additional appraisal report should be obtained when there is a wide divergence in the opinion of value between two appraisers and their differences cannot be reconciled by the U.S. Attorney. It is usually desirable to obtain an additional appraisal when good market data is not available, or where large sums of money are involved. Where demolition of improvements is contemplated, or where the land is to be inundated or otherwise changed soon after the filing of condemnation proceedings, it is important to secure immediately any additional appraisal which might be needed, in order that the appraiser may view the property in its original condition.

For further guidance on obtaining additional appraisals, see USAM 5-4.981, A Procedural Guide for the Acquisition of Real Property by Governmental Agencies at pages 34-37.

5-4.964 Selection of Qualified Appraisers and Other Experts

The selection and approval of appraisers and other experts is a joint effort of the U.S. Attorney and the Appraisal Unit. U.S. Attorneys should insist that the acquiring agencies which they represent use only appraisers who have been approved by the Department as being acceptable for presentation of expert testimony. Where appraisers who are not adequate for this purpose are employed, money is wasted, since it will be necessary to expend more money for additional appraisals of the same property, and the government may be required to change estimates of value

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in midstream, thereby impairing settlement opportunities. Where full cooperation is not being received from an acquiring agency in regard to the employment of experts, the matter should be referred to the Assistant Attorney General, Land and Natural Resources Division, for resolution.

5-4.965 Fees for Appraisers and Other Expert Witnesses

Where expert witnesses' services are necessary, the U.S. Attorney must insure that the proposed fee is no more than the customary price for such services in the area. Where volume appraisal work is given to an appraiser, the more advantageous fees, which are possible because of volume, should be secured. In those instances where the U.S. Attorney is uncertain as to the appropriate fee for a given assignment, or where an unusually large fee is involved, the recommendation of the Appraisal Unit should be obtained. Sound business judgment must be exercised in negotiating for services to make sure that the United States is getting full value at not more than the locally prevailing rates. Witness fees must be on a daily rate basis and per diem rates should be accurately prorated to the fraction earned, unless circumstances make this unfair. Fees for appraisal reports should be negotiated on a flat fee basis.

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5-5.000 THE INDIAN RESOURCES SECTION

5-5.001 Establishment of the Indian Resources Section

The Indian Resources Section was created on May 27, 1975, by the Land and Natural Resources Directive No. 6-75, to conduct litigation for the United States as trustee for the private rights of Indian people.

5-1.100 AREA OF RESPONSIBILITY

5-5.110 General Responsibilities

The Indian Resources Section supervises the litigation of civil suits in which the United States protects tribal assets and jurisdiction, and asserts on behalf of Indian individuals and tribes rights to property, including hunting and fishing rights and water rights. Civil litigation involving the infringement of tribal self-government (sovereignty) by states in the fields of taxation, alcoholic beverage control, law enforcement, reservation boundaries and other related matters is the responsibility of this section.

5-5.120 Statutes Administered

Most of the statutes pertaining to the trust responsibilities of the United States to the Indian people are found in Title 25 of the United States Code.

Treaties and executive orders are compiled in Kapplers, Indian Affairs, Laws and Treaties, a five-volume work which is now being revised. Cohen's Handbook of Federal Indian Law is a valuable research tool for use in understanding Indian litigation, and the statutes involved.

The Indian Resources Section does not administer cases under the Indian Civil Rights Act, 25 U.S.C. §1302; the Civil Rights Division has the responsibility for enforcing this section. The General Litigation Section of the Land and Natural Resources Division has the responsibility for litigation of cases brought by Indians or Indian tribes against the United States or federal officials (see USAM 5-7.000). The Indian Claims Section of the Land and Natural Resources Division has jurisdiction of money claims brought by the Indian tribes against the United States. See USAM 5-6.000, infra.

5-5.130 Legal Principles Governing Litigation Involving Indian Property Rights

The following is the text of a letter from Attorney General Bell to Secretary of Interior Cecil Andrus concerning the role of the Department of Justice in Indian Trust Litigation.

MAY 31, 1979

Honorable Cecil D. Andrus
Secretary of Interior
Washington, D.C.

Dear Mr. Secretary:

As you know, the Department of Justice has long represented the United States in litigation for the purpose of protecting Indian property rights secured by statutes or treaties. This has been and will continue to be an important function of this Department, and I would like to set forth my understanding of the legal principles governing its conduct.

In fulfillment of the special relationship contemplated in the Constitution between the Federal Government and the Indian tribes, the Congress has enacted numerous laws and the Senate has ratified numerous treaties for the benefit and protection of Indian tribes and individuals, their property and their way of life. Where these measures require implementation by the Executive Branch, the administrative responsibility typically resides with the Secretary of the Interior, 43 U.S.C. §1457(10). The Attorney General is in turn responsible for the conduct, on behalf of the United States, of litigation arising under these statutes and treaties. This obligation in Indian cases is but one aspect--albeit an important one--of the Attorney General's statutory responsibility for the conduct of litigation in which the United States or an agency or officer thereof is a party or is interested. 28 U.S.C. §§516, 519.

The Secretary of the Interior and the Attorney General perform their duties here, as in all other areas, under the superintendence of the President. We are the President's agents in fulfilling his constitutional duty to take care that the laws be faithfully executed. Where a particular

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statute, treaty, or Executive Order manifests a purpose to benefit all Indians or a tribe or individual Indians or to protect their property, it is the obligation of the responsible Executive Branch officials to give full effect to that purpose. In your role as Secretary of the Interior, you are charged with administering most of the laws and treaties applying to Indians and are often in a policy formulating role with regard thereto. And where litigation is concerned, it is the duty of the Attorney General to ensure that the interest of the United States in accomplishing the congressional or executive purpose is fully presented in court.

The Executive and Judicial Branches have inferred in many laws extending federal protection to Indian property rights the intent that the Executive act as a fiduciary in administering and enforcing these measures. Where applicable law imposes such standards of care, faithful execution of the law of course requires the Executive to adhere to those standards. Thus, it in no way diminishes the central importance of our respective functions to acknowledge that they find their source in specific statutes, treaties, and Executive Orders or to recognize that they are to be performed with the same faithfulness to legislative and executive purpose as are the obligations devolving upon this branch of the federal establishment generally.

A significant portion of the litigation with which we are here concerned relates to property rights reserved to a tribe by treaty or in the creation of a reservation or property which Congress has directed be held in trust, managed, or restricted for the benefit of a tribe or individual Indian. When the Attorney General brings an action on behalf of the United States against private individuals or public bodies to protect these rights from encroachment, he vindicates not only the property interests of the tribe or individual Indian, as they may appear under law to the United States, but also the important governmental interest in ensuring that rights guaranteed to Indians under federal laws and treaties are fully effective.

There is no disabling conflict between the performance of these duties and the obligations of the Federal Government to all the people of the Nation. The functional thesis upon which our form of government is premised --the Separation of Powers--pre-supposes that the people as a whole benefit when the Executive Branch enforces the laws enacted, and protects Indian property rights recognized in treaty commitments ratified, by a coordinate branch. The fact that an identifiable class realizes tangible benefits from litigation brought by the Federal Government does not distinguish Indian cases from many civil rights, labor, and other cases. Just as we go to court to enforce the laws designated to protect minorities from

discrimination or disenfranchisement by the majority, we must litigate when necessary to protect rights secured to Indians without reference to whether any present majority of the citizenry would profit from, or otherwise embrace, that action.

It is important to emphasize, however, that the Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indians. Thus, in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as "trustee," not the "beneficiary." He is not obliged to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the government brings its considerable litigating resources.

The litigating position adopted by the Attorney General on behalf of the United States may affect your administrative and policy-making functions. Accordingly, with respect to all litigation in which the Attorney General represents the United States in protecting Indian property rights secured by statutes or treaties, this Department would expect to receive--and would most carefully consider--the advice of your Department, possessing as it does the primary policy responsibility in Indian matters.

Where there are other statutory obligations imposed on the Executive in a particular case aside from those affecting Indians, faithful execution of the laws require the Attorney General to resolve these competing or overlapping interests to arrive at a single position of the United States. In arriving at a single position, however, we must also take into account the rule of construction now firmly established that Congress' actions toward Indians are to be interpreted in light of the special relationship and special responsibilities of the government toward the Indians.

And, finally, the President's duty faithfully to execute existing law does not preclude him from recommending legislative changes in fulfillment of his constitutional duty to propose to the Congress measures he believes necessary and expedient. These measures may--indeed must--be framed with the interest of the Nation as a whole in mind. In so doing, the President has the constitutional authority to call on either of us for our views on legislation to change existing law notwithstanding the duty to execute that law as it now stands.

I look forward to close cooperation between our two Departments in these matters.

Yours sincerely

Griffin B. Bell
Attorney General

5-5.200 ORGANIZATION

The Indian Resources Section is administered by a Chief and an Assistant Chief.

5-5.300 PROCESSING AND HANDLING OF INDIAN RESOURCES SECTION CASES

5-5.301 Requests for Representation under 25 U.S.C. §175

Section 175 of Title 25 provides that the U.S. Attorney shall represent Indians in all suits at law and in equity in all states and territories where there are reservations or allotted Indians. This statute has been construed to be nonmandatory, Siniscal v. United States, 208 F.2d 406 (Ore. 1953); United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d 53 (Ariz. 1968).

A. Advice to Individual or Tribe Requesting Representation

When a request for representation is received the party requesting assistance should be advised:

1. That we cannot act without the concurrence of or a request from the Department of the Interior, the agency primarily responsible for acting as trustee for the Indians;
2. That the request will be forwarded to the Indian Resources Section which will solicit the recommendation of that department; and

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3. That a request should be made directly to the local office of the Solicitor for the Department of the Interior, if possible.

B. Forward Requests to Indian Resources Section

All requests for representation under Section 175, along with any comments thereon of the U.S. Attorney, should be forwarded immediately to the Indian Resources Section, which will seek guidance from the Department of the Interior.

C. U.S. Attorney Advised

The U.S. Attorney will be advised of any recommendations from the Department of the Interior on requests under Section 175 and consulted thereon before the Chief of the Indian Resources Section makes any final determination on requests for representation.

5-5.302 Transmittal of Papers to Indian Resources Section

In all cases assigned under USAM 5-1.410, 5-1.413, and 5-4.414, supra, one copy of the complaint and one copy of all other papers filed by any party or by the court, with the exception of depositions, and one copy of any offer in compromise, should be promptly forwarded to the Indian Resources Section.

5-5.310 Authority of U.S. Attorneys to Initiate Actions Without Prior Authorization, i.e., Direct Referral Cases

Pursuant to Land and Natural Resources Division Directive No. 7-76, U.S. Attorneys are authorized to act in matters concerning tribal and restricted individual Indian land, not involving new or unusual questions or questions of title or water rights, in response to a direct request in writing from an authorized field officer of the department or agency concerned, without prior authorization from the Land and Natural Resources Division, in the following described cases:

A. Actions to recover possession of property from tenants, squatters, trespassers or others, and actions to enjoin trespasses on the land if the actual damages based upon a trespass do not exceed \$100,000;

B. Actions to collect delinquent operation and maintenance charges accruing on Indian irrigation projects of not more than \$100,000.

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5-5.311 Notification to Indian Resources Section of Intention to File Direct Referral Actions

The Chief, Indian Resources Section, should be immediately notified of the filing of a civil complaint in a case authorized for direct referral and a copy of the written request from the authorized field officer for such direct reference action and copy of the initial pleading should be furnished with the notification.

5-5.312 Transmittal of Papers to Indian Resources Section and Client Agencies in Direct Referral Cases

One copy of each letter prepared or received by a U.S. Attorney in a direct referral case, as well as one copy of each pleading and paper filed by any party or by the court, shall be promptly forwarded to the Indian Resources Section and two copies shall be forwarded to the local officer of the referring agency (the local officer forwards one copy to his agency in Washington, D.C.).

5-5.320 Actions Not Subject to Direct Referral to U.S. Attorneys

Responsibility for the handling of cases under the supervision of the Indian Resources Section is assigned by the Chief of the Section under the provisions of USAM 5-1.322 through 5-1.326, supra. However, when a case is referred to Indian Resources Section, copies of the relevant documents shall be sent to the Office of the U.S. Attorney for purposes of soliciting any comments on either the merits of the proposed litigation or the appropriate method for handling the litigation.

5-5.321 Prior Authorization Needed to Initiate Actions

Aside from cases of the type described in USAM 5-5.310, supra, no action under the supervision of the Indian Resources Section may be initiated by a U.S. Attorney without specific prior authorization of the Assistant Attorney General, who shall sign a complaint prior to its being filed. See USAM 5-1.302, supra.

5-5.400 [RESERVED]

5-5.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

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5-5.510 General

The general instructions set forth in USAM 5-1.500, supra, with respect to the handling of litigation apply in every respect to the litigation of the Indian Resources Section. Particularly, it is of the utmost importance that complaints filed against the federal government and federal officials in matters relating to the areas of responsibility of the Indian Resources Section be transmitted promptly to the Chief of the Section. Complaints filed against the United States or federal officials by individual Indians or Indian tribes are not within the responsibility of the Indian Resources Section and should be sent to the General Litigation Section of the Land and Natural Resources Division. See USAM 5-7.120, infra.

5-5.520 Lis Pendens

In all actions affecting the title to real estate, a notice of the pendency of the action or lis pendens should be filed or recorded in the proper local records according to local law, except in those jurisdictions where the law is settled that the commencement of the action is notice to all persons affected. See 28 U.S.C. §1964.

5-5.530 Policy on Conflicts of Interest

In cases where the Department is called upon or required to represent individual Indians and Indian tribes instances may arise where conflicts exist between the interests of those individual Indians or tribes and the interests of the federal government or its agencies. Where possible, efforts should be made prior to the initiation of litigation to resolve such conflicts. When it is determined that such conflicts exist, the Chief of the Indian Resources Section should be notified so that appropriate action may be taken.

5-5.540 Policy on Consultation with Indians

Prior to the initiation of litigation on behalf of individual Indians or Indian tribes, efforts should be made to consult with the individual Indians or tribes and their representatives to obtain their concurrence in the course of action proposed.

5-5.550 Policy on Intervention

Intervention by individual Indians or Indian tribes in litigation where the Department of Justice has undertaken the representation of the individual Indians or tribes is not encouraged, especially where Indian or tribal concurrence has been obtained in accord with USAM 5-5.540, supra.

Where a petition in intervention is filed by a tribe, and where the United States has no apparent conflict of interest within the meaning of USAM 5-5.530, supra, it is appropriate for the U.S. Attorney to seek appointment as lead counsel in prosecution of the action or to seek conditions on the tribe's intervention so as to prevent duplication of effort.

5-5.600 SETTLEMENT AND DISMISSAL OF CASES

5-5.610 General

Except with respect to direct referral cases, discussed in USAM 5-5.310, supra, no claim or case under the jurisdiction of the Indian Resources Section may be settled or dismissed without specific or delegated authority from the Attorney General.

5-5.620 Authority of U.S. Attorneys to Settle or Dismiss Direct Referral Cases

The authority of the U.S. Attorney to dismiss or settle direct referral cases subject to the supervision of the Indian Resources Section is set forth in Land and Natural Resources Directive No. 7-76, pertinent portions of which are in USAM 5-1.630, infra.

5-5.630 Transmittal of Compromise Offer to Indian Resources Section; Recommendations With Respect to Acceptance

Where compromise in a case other than a direct referral case is offered to a U.S. Attorney, he/she shall require the offerer to reduce the proposal to writing and to submit with it a cashier's or certified check, bank draft, or money order for the amount offered, drawn or endorsed unconditionally to the order of the Treasurer of the United States. Where a large sum is

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involved, a token deposit is acceptable. The U.S. Attorney then shall forward to the Department the written offer, his/her recommendation and the reasons therefor, and a statement of the debtor's financial status.

The recommendation should be guided by the principles that compromise offers cannot be accepted unless, (1) there is doubt as to whether judgment can be secured for an amount larger than that offered in compromise, (2) if a judgment has been or can be secured, there is doubt as to whether an amount larger than that offered can be collected, or, (3) the probable cost of collection exceeds the difference between the amount recoverable and the amount offered.

The financial statement need not be forwarded where the offer is recommended for acceptance solely because there is doubt as to whether judgment can be secured for an amount larger than that offered or because the probable cost of collection exceeds the difference between the amount offered and the amount recoverable.

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5-6.000 THE INDIAN CLAIMS SECTION

5-6.001 Establishment

The Indian Claims Section was created on December 17, 1953, by Land Division Order No. 8.

5-6.100 AREA OF RESPONSIBILITY

5-6.110 General

The Indian Claims Section has the responsibility for the Defense of claims of Indian tribes before the United States Claims Court against the United States; occasional claims on behalf of Indian tribes before the United States district courts; and claims of tribes under special jurisdictional acts.

5-6.120 Statutes Administered

The Indian Claims Section conducts litigation under the following statutes:

A. Indian tribal claims presented to the United States Claims Court under the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. §70 et seq.;

B. Indian tribal claims filed before the United States Claims Court under the provisions of 28 U.S.C. §1505; and

C. Indian tribal claims filed before the United States Claims Court and the United States district courts under the provisions of any special jurisdictional acts

5-6.130 Common Law

No court has assumed jurisdiction over Indian tribal actions against the United States on the basis of common law.

5-6.200 ORGANIZATION

The Section is administered by a Chief.

5-6.300 SUPERVISION AND HANDLING OF INDIAN CLAIMS SECTION CASES

5-6.310 Assignment of Case Responsibility

The Indian Claims Section does not initiate actions of any kind; its sole function is to defend the United States against actions initiated under the statutes listed in USAM 5-6.120, supra. Consequently, no direct referral cases relating to the work of this Section can exist.

All cases filed before the United States Claims are handled exclusively by the staff of the Indian Claims Section.

Very few tribal actions against the United States are initiated in the United States district courts; the supervision and direction of such cases, and coordination between the Section and the U.S. Attorney, will be determined on a case-by-case basis.

5-6.400 [RESERVED]

5-6.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-6.510 General

Since so few tribal actions against the United States are initiated in district courts, no directions for handling such cases are herein formulated.

Should a tribal action be filed against the United States in a United States district court, the United States Attorney shall immediately forward a copy of the complaint, together with all attachments and other relevant materials, to the Chief of the Indian Claims Section.

5-6.600 SETTLEMENT AND DISMISSAL OF CASES

5-6.610 Civil Action by Indian Tribes Against the United States Not Subject to Settlement by U.S. Attorneys

U.S. Attorneys are not authorized to settle any case arising under the statutes listed in USAM 5-6.120, supra. Any offer to settle any such action must be directed to the Chief of the Indian Claims Section, who will take

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final action, if the matter is within his/her delegated authority, or who will, if the matter is not within the scope of his/her delegated authority, forward the offer, with his/her recommendation, to the Deputy Assistant Attorney General, who in turn, will either act upon the offer, or if necessary, refer the matter to the Assistant General.

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5-7.000 THE GENERAL LITIGATION SECTION

5-7.001 Establishment

The General Litigation Section was created by Order of June 28, 1960, consolidating the Trial Section and the Water Resources Section.

5-7.100 AREA OF RESPONSIBILITY

5-7.110 General

All pending and contemplated cases, matters and proceedings in the trial courts, assigned to the Land and Natural Resources Division, except condemnation proceedings brought by the United States and matters specifically assigned to the Indian Claims Section, Indian Resources Section, the Marine Resources Section and the Pollution Control Section, are handled by the General Litigation Section.

5-7.120 Statutes Administered

The General Litigation Section supervises and conducts litigation arising not only under federal statutes, but also under treaties and agreements with Indians, Executive Orders, regulations of the various departments and agencies, the common law, and the laws of the various States. The federal statutes giving rise to litigation handled by the Section include the following:

A. Airports

1. Airport and Airway Development Act of 1970, enacted May 21, 1970, 84 Stat. 220, as amended, 49 U.S.C. §1711 et seq.

B. Civil Works Projects, Corps of Engineers

1. Flood Control Act, enacted June 28, 1938, 52 Stat. 1215, as amended, 33 U.S.C. §701b, et seq. (while the 1938 Act is the organic act covering flood control projects, Congress has passed numerous acts authorizing flood control projects, beginning with the Act of March 1, 1917, 39 Stat. 948, 33 U.S.C. §§643, 701-703; small projects are authorized by Section 205 of Title II of the Act of June 30, 1948, 62 Stat. 1182, as amended, 33 U.S.C. §701s);

2. Rivers and harbors (there is no organic act covering river and harbor improvement projects of the Corps of Engineers; authorizations and appropriations are included in various statutes, sometimes biannually, codified beginning with 33 U.S.C. §540; see also 16 U.S.C. §832 et seq.).

C. Energy

1. Atomic Energy Act of 1954, enacted August 1, 1946, as added August 30, 1954, 68 Stat. 951, as amended, 42 U.S.C. §2011, et seq.;

2. Energy Reorganization Act, enacted October 11, 1974, 88 Stat. 1233, 42 U.S.C.A. §§5801-5814, 5816-5820, 5841-5849, 5871-5879, 5891.

D. Environmental Matters

1. The National Environmental Policy Act of 1969, enacted January 1, 1970, 83 Stat. 852, 42 U.S.C. §4331 et seq.

E. Fish and Wildlife

1. Fish and Wildlife Coordination Act, 16 U.S.C. §§661-666(c), except Section 666a (see USAM 5-10.120, infra);

2. Wild Horse Protection Act, 16 U.S.C. §1331 et seq., except Section 1338 (see USAM 5-10.120, infra);

3. Fish and Wildlife Coordination Act, 16 U.S.C. §§661-666(c) except Section 666a (see USAM 5-10.120, infra);

4. Wildlife Restoration Act, enacted September 2, 1937, 50 Stat. 917, as amended, 16 U.S.C. §§669-669b, 669c-669i;

5. Bald and Golden Eagles Protection Act, enacted June 8, 1940, 54 Stat. 250, as amended, 16 U.S.C. §§668-668d;

6. Dingell-Johnson Fish Restoration Act, enacted August 9, 1950, 64 Stat. 430, as amended, 16 U.S.C. §§777-777i, 777k;

7. Fish and Wildlife Act of 1956, enacted August 8, 1956, 70 Stat. 1119, as amended, 16 U.S.C. §§742a-j;

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8. National Wildlife Refuge System Administration Act, enacted October 15, 1966, 80 Stat. 927, as amended, 16 U.S.C. §§668dd, 668ee;

9. Fur Seal Act of 1966, enacted November 1, 1966, 80 Stat. 1091, as amended, 16 U.S.C. §1151 et seq.;

10. Wild Horse Protection Act, enacted December 15, 1971, 85 Stat. 649, 16 U.S.C. §1331 et seq.;

11. Wildlife Restoration Act of 1972, enacted October 25, 1972, 86 Stat. 1172, 16 U.S.C. §§669b-669g-1 (Supp. 1973); and

12. Endangered and Threatened Species Preservation Act of 1973, December 28, 1973, 87 Stat. 884, 16 U.S.C. §§1531-1534.

F. Highways

1. Federal-Aid Highway Act, enacted August 27, 1958, 72 Stat. 885, as amended, 23 U.S.C. §101 et seq.

G. Indian (other than natural resources litigation)

1. Treaties, agreements, and acts of Congress affecting Indians are published in Kappler, Indian Laws and Treaties, in five volumes (an additional volume to bring the publication up to date has been authorized). All acts of Congress and some, but not all, treaties and agreements are published in the Statutes at Large. Title 25 of the United States Code is of limited use. It contains statutes of general application, many of which are obsolete, and recently enacted statutes relating to particular tribes, such as termination acts, 25 U.S.C. §541 et seq.

2. Suits by Indians for allotments are authorized by the Act of August 15, 1894, 28 Stat. 305, as amended, 25 U.S.C. §345.

3. Alaska Native Claims Settlement Act, enacted December 18, 1971, 85 Stat. 688, 43 U.S.C. §1601 et seq., as amended 89 Stat. 1145.

H. Minerals

1. Mining Law of 1872, R. S. 2319 (Act of May 10, 1872, 17 Stat. 91), as amended, 30 U.S.C. §22 et seq.;

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2. Mineral Leasing Act of 1920, enacted February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. §§181-287;

3. Disposal of Materials on Public Lands, enacted July 31, 1947, 61 Stat. 681, as amended, 30 U.S.C. §§601-603;

4. Mineral Leasing Act of 1947 (Acquired Lands), enacted August 7, 1947, 61 Stat. 913, 30 U.S.C. §§351-359;

5. Multiple Mineral Development Act, enacted August 13, 1954, 68 Stat. 708, as amended, 30 U.S.C. §§521-531;

6. Common Varieties Act, enacted July 23, 1955, 69 Stat. 368, as amended, 30 U.S.C. §§611-625;

7. Geothermal Steam Act of 1970, enacted December 24, 1970, 84 Stat. 1566, 30 U.S.C. §§1001-1025; and

8. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§1201-1328.

I. National Forests

1. Forest Reserve Act of 1891, enacted March 3, 1891, 26 Stat. 1103, as amended, 16 U.S.C. §471;

2. The Organic Act for the United States Forest Service, enacted June 4, 1897, 30 Stat. 34, as amended, 16 U.S.C. §§475-476, 551, etc.;

3. The Weeks Forestry Act, enacted March 1, 1911, 36 Stat. 961, as amended, 16 U.S.C. §§480, 500, 515-519, 521, 563;

4. Act authorizing mineral development, enacted March 4, 1917, 39 Stat. 1150, as amended, 16 U.S.C. §520;

5. Knutson-Vandenberg Act, enacted June 9, 1930, 46 Stat. 527, 16 U.S.C. §§576, 576a-b;

6. Multiple Use and Sustained Yield Act, enacted June 12, 1960, 74 Stat. 215, 16 U.S.C. §§528-531;

7. Act authorizing addition of lands to national forests, enacted July 9, 1962, 76 Stat. 140, 43 U.S.C. §315g-1;

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8. Wilderness Act, enacted September 3, 1974, 78 Stat. 890, as amended, 16 U.S.C. §1131-1135;

9. Wild and Scenic Rivers Act, enacted October 2, 1968, 82 Stat. 906, 16 U.S.C. §1274 et seq.;

10. National Trails System Act, enacted October 2, 1968, 82 Stat. 919, 16 U.S.C. §1241 et seq.;

11. Forest and Rangeland Renewable Resources Planning Act, enacted August 17, 1974, 88 Stat. 476, 16 U.S.C. §1601 et seq.;

12. Wilderness Areas in Eastern Half of United States enacted January 3, 1975, 88 Stat. 2096, 16 U.S.C.A. §1131.

J. National Parks and Preservation Acts

1. Preservation of Antiquities and National Monument Act, enacted June 8, 1906, 34 Stat. 225, 16 U.S.C. §§431-433;

2. National Park Service Act, enacted August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. §§1-4;

3. Historic Sites, Buildings and Antiquities Act, enacted August 21, 1935, 49 Stat. 666, as amended October 9, 1965, 79 Stat. 971, 16 U.S.C. §§461-467;

4. Public Park and Recreational Facilities in Water Resource Development Projects, enacted December 22, 1944, 58 Stat. 889, as amended, 16 U.S.C. §460d;

5. National Seashore Recreation Areas. There is no organic act but for specific authorizations, see 16 U.S.C. §459 et seq.;

6. Act for Preservation of Historical and Archaeological Data Threatened by Dam Construction or Alterations of Terrain, enacted June 27, 1960, 74 Stat. 220, as amended, 16 U.S.C. §469 et seq.;

7. National Historic Preservation Act of 1966, enacted October 15, 1966, 80 Stat. 915, as amended, 16 U.S.C. §§470-470b, 470c-470n;

8. The Wilderness Act, see I-8, I-12;

9. Wild and Scenic Rivers Act, see I-9;

10. National Trails System Act, see I-10;

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11. Archeological Resources Protection Act, enacted October 31, 1979, 93 Stat. 721, 16 U.S.C. §470aa et seq.;

12. Alaska Lands Act, enacted December 2, 1980, Pub. L. No. 96-487.

K. Protection of Navigable Waters

1. Construction of bridges, causeways, dams or dikes: Section 9 of the Act of March 3, 1899, 30 Stat. 1151, 33 U.S.C. §401;

2. Establishment of Harbor Lines: Section 11 of the Act of March 3, 1899, 30 Stat. 1151, 33 U.S.C. §404.

L. Public Housing

1. The National Housing Act, enacted June 27, 1934, 48 Stat. 1246, as amended, 42 U.S.C. §1701 et seq.;

2. The Housing Act, enacted September 1, 1937, 50 Stat. 888, as amended, 42 U.S.C. §1401 et seq.;

3. The Housing Act of 1949, enacted July 15, 1949, 63 Stat. 413, as amended, 42 U.S.C. §1441 et seq.;

4. Disaster Relief Act of 1970, enacted December 31, 1970, 84 Stat. 1744, 42 U.S.C. §4401 et seq.;

5. Housing and Community Development Act of 1974, enacted August 22, 1974. 88 Stat. 633, 42 U.S.C. §5301 et seq.

M. Public Lands

Recently enacted legislation, the Federal Land Policy and Management Act of 1976, enacted October 21, 1976, 90 Stat. 2743, extensively alters the relevant statutory authority, some of which is listed below, for the management of the Public Lands. Although in some instances previous legislation has been expressly repealed, the full application of this statute is not yet clear. A revision of subsection M will be prepared.

1. Homestead Act, R.S. 2289 (act of May 20, 1862, 12 Stat. 292), as amended, 43 U.S.C. §161 et seq.;

2. Mineral Lands Not Liable to Entry, R.S. 2302 (Act of June 1866, 14 Stat. 67), 43 U.S.C. §201;

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3. Right of Way Act (Railroad), enacted March 3, 1875, 18 Stat. 482, 43 U.S.C. §§934-939;
4. Desert Land Act, enacted March 3, 1877, 19 Stat. 377, as amended, 43 U.S.C. §321 et seq.;
5. Unlawful Inclosures of Public Lands Act, enacted February 25, 1885, 23 Stat. 321, as amended, 43 U.S.C. §§1061-1066;
6. Reclamation Act, enacted June 17, 1902, 32 Stat. 388, as amended, 43 U.S.C. §431 et seq.;
7. Pickett Act, enacted June 25, 1910, 36 Stat. 847, as amended, 43 U.S.C. §§141-142;
8. Oregon-California Railroad Land Grant Acts (Acts of June 9, 1916, 39 Stat. 218, and February 26, 1919, 40 Stat. 1179), as amended, 43 U.S.C. §§1181a-j;
9. Color of Title Act, enacted December 22, 1928, 45 Stat. 1069, as amended, 43 U.S.C. §§1068-1068b;
10. Taylor Grazing Act of 1934, enacted June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. §§315-315g, 315h-315m, 315n, 315o-1;
11. McCarran Water Rights Suit Act, enacted July 10, 1952, 66 Stat. 560, 43 U.S.C. §666;
12. Submerged Lands Act of 1953, enacted May 22, 1953, 67 Stat. 29, 43 U.S.C. §§1301-1303, 1311-1315.

N. Suits Against the United States

1. Partition actions involving the United States, enacted June 25, 1948, 62 Stat. 972, 28 U.S.C. §2409;
2. Actions affecting property on which the United States has a lien, enacted June 25, 1948, 62 Stat. 972, as amended, 28 U.S.C. §2410. See Land and Natural Resources Division Directive No. 9-68, dated August 5, 1968: Procedure for the Handling of Condemnation Actions against the United States under or purportedly under Title 28 U.S.C. §2410;

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3. Real Property Quiet Title Actions, enacted October 25, 1972, 86 Stat. 1176, 28 U.S.C. §2409a;

4. Tucker Act, 28 U.S.C. §1346(a)(2) (to the extent that matters falling within the area of responsibility of the Land and Natural Resources Division are involved; see USAM 5-1.100, supra).

O. Additional Statutes

1. Powerplant and Industrial Fuel Use Act 42, U.S.C. §8301, et seq.

2. National Energy Conservation Policy Act 42, U.S.C. §8201, et seq.

3. Public Utility Regulatory Policy Act, (Title I), 16 U.S.C. §2601, et seq.

4. Energy Supply and Environmental Coordination Act, 15 U.S.C. §761, et seq.

5. The Submerged Lands Act, 43 U.S.C. §1301, et seq.

6. The Outer Continental Shelf Lands Act, 43 U.S.C. §1331, et seq.

7. The Coastal Zone Management Act, 16 U.S.C. §1451, et seq.

8. Deep Seabed Mining Act, 30 U.S.C. §1401, et seq.

9. Archeological Resources Protection Act, enacted October 31, 1979, 93 Stat. 721, 16 U.S.C. §470aa et seq.

10. Alaska Lands Act, enacted December 2, 1980, Pub. L. No. 96-487.

5-7.200 ORGANIZATION

5-7.210 General

The Section is administered by a Chief and two Assistant Chiefs. The work of the Section is assigned among staff attorneys according to experience and workload.

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5-7.300 SUPERVISION AND HANDLING OF GENERAL LITIGATION SECTION CASES

5-7.301 Requests for Instructions

All requests for instructions and guidance relating to the prosecution or defense of actions under the jurisdiction of the General Litigation Section shall be referred to the Chief of the General Litigation Section of the Land and Natural Resources division of the Department of Justice, Washington, D.C. 20530 ((202) 633-2705).

5-7.310 Authority of United States Attorneys to Initiate Actions Without Prior Authorization, i.e., Direct Referral Cases

The authority of United States Attorneys to initiate cases under the supervision of the General Litigation Section is set forth in Land and Natural Resources Division Directive 7-76, pertinent parts of which are in USAM 5-1.310, supra, and Land and Natural Resources Division Directives 8-80 and 9-81 which amend Directive 7-76.

5-7.311 Actions to Recover Money to Be Instituted Only Where a Judgment Is Collectible

No Action for the recovery of money only shall be instituted unless the referring agency supplies satisfactory proof that a judgment, if recovered, would be collectible.

5-7.320 Actions Not Subject to Direct Referral to U.S. Attorney

Responsibility for the handling of cases under the supervision of the General Litigation Section is assigned by the chief of the Section under the provisions of USAM 5-1.322 through 5-1.326, supra.

5-7.321 Prior Authorization Needed to Initiate Action

Except for cases authorized to be filed by USAM 5-1.310, supra, no case under the supervision of the General Litigation Section may be initiated by a United States Attorney without the prior authorization of the Assistant Attorney General.

5-7.322 Notification to General Litigation Section of Cases Involving the National Historic Preservation Act or its Regulations

The Department of Justice has agreed, pursuant to 16 U.S.C. §470(k), to notify the Advisory Council on Historic Preservation of all cases involving the National Historic Preservation Act, 16 U.S.C. §470 *et seq.*, or regulations promulgated thereunder (36 C.F.R. Part 800). The Advisory Council will rarely be a party to the litigation, however, such notification is necessary because the Council is charged, *inter alia*, with advising the President and Congress on matters relating to historic preservation and with reviewing federal, federally assisted, and federally licensed undertakings affecting cultural properties.

Many of these cases involve proposed alterations to, or demolition of, historic structures, and many originate as temporary restraining orders. It is especially important, therefore, that Department attorneys receive early notice of these cases, so that they can then notify the Advisory Council. Accordingly, upon receipt of any complaint raising an issue under the Historic Preservation Act, the United States Attorney's office should call the attorney assigned to the case in the Department of Justice in Washington, D.C. who will then notify the Council. Most of the cases involving the Act or regulations are within the jurisdiction of the General Litigation Section, Land and Natural Resources Division, FTS 633-2704. In the event a request for a temporary restraining order is filed before the case is assigned to a General Litigation attorney, the Chief of that Section should be notified. It will also be the responsibility of the departmental attorney assigned to the case to notify the Division's Policy, Legislation and Special Litigation Section that the case is pending.

5-7.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-7.510 General

The general instructions set forth in USAM 5-1.500 *et seq.*, *supra*, with respect to the handling of litigation apply in every respect to the litigation of the General Litigation Section. Particularly, it is of the utmost importance that complaints filed against the Federal Government and federal officials in matters relating to the area of responsibility of the General Litigation Section be transmitted promptly to the Chief of the Section.

5-7.520 Lis Pendens

Whenever required by the nature of the case, a notice of the pendency of the action or lis pendens shall be filed or recorded among the proper local records except in those jurisdictions where the law is settled that the commencement of the action is notice to all persons affected.

5-7.530 Judgments

United States Attorneys should note and comply with the instructions relating to the recording, collection and enforcement of judgments set forth in USAM 1-1.580, 581, 582, 583, 584, 585 and 586.

5-7.600 SETTLEMENT AND DISMISSAL OF CASES

5-7.610 General

Except with respect to direct referral cases (discussed in USAM 5-7.630, infra) no claim or case under the jurisdiction of the General Litigation Section may be settled or dismissed without specific or delegated authority from the Attorney General. See USAM 5-1.600 et seq., supra.

5-7.620 Transmittal of Compromise Offer to General Litigation Section: Recommendations With Respect to Acceptance

Where compromise in a case other than a direct referral case is offered to a U.S. Attorney, he/she shall require the offerer to reduce the proposal to writing and to submit with it a cashier's or certified check, bank draft, or money order for the amount offered, drawn or endorsed unconditionally to the order of the Treasurer of the United States. Where a large sum is involved, a token deposit is acceptable. The U.S. Attorney then shall forward to the Department the written offer, his/her recommendation and the reasons therefor, and a statement of the debtor's financial status.

The recommendation should be guided by the principles that compromise offers cannot be accepted unless (a) there is doubt as to whether judgment can be secured for an amount larger than that offered or because the probable cost of collection exceeds the difference between the amount offered and the amount recoverable.

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5-7.630 Authority of United States Attorneys to Settle or Dismiss Direct Referral Cases

The authority of U.S. Attorneys to settle or dismiss direct referral cases under the supervision of the General Litigation Section is set forth in USAM 5-1.630, supra.

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5-8.000 THE APPELLATE SECTION

5-8.001 Establishment

The Appellate Section was created on July 12, 1937, by memorandum of that date signed by Assistant Attorney General Carl McFarland.

5-8.100 AREA OF RESPONSIBILITY

5-8.110 General

The Appellate Section is responsible for all division cases on appeal which were handled by the General Litigation Section, the Indian Resources Section, the Environmental Defense Section, the Environmental Enforcement Section, the Wildlife and Marine Resource Section, and the Land Acquisition Section in the district courts, including criminal prosecutions under the various environmental control and wildlife protection statutes. The responsibility for handling appeals of division cases handled by U.S. Attorneys is determined pursuant to the provisions of USAM Title 2, Appeals.

5-8.200 ORGANIZATION

5-8.210 General

The Appellate Section is composed of a Chief, an Assistant Chief, and those members of the professional, clerical, and stenographic staff specifically assigned to it. Five senior attorneys are designated as counselors to, and reviewers of the work of, the junior attorneys.

5-8.300 SUPERVISION AND HANDLING OF APPELLATE CASES

5-8.310 General

Except as provided for in USAM 5-8.320, infra, staff attorneys in the Appellate Section handle all cases within the area of responsibility of that Section. The Chief of the Appellate Section is in charge of the assignment of all cases. Generally, the function of assigning cases has been delegated

to the Assistant Chief. The reviewing attorney is specified at the time the case is assigned. Both the attorney assigned the case and the reviewing attorney are then responsible for all aspects of the case. The junior attorney apprises the reviewing attorney of all developments.

5-8.311 Cooperation and Coordination with the Council on Environmental Quality

To aid this Division in carrying out its responsibilities under the National Environmental Policy Act (NEPA) and to provide more effective representation of the interests of the public and the government in cases arising under NEPA, the following procedures shall be observed by the General Litigation and Appellate Sections to gain the views of the Council on Environmental Quality (CEQ):

A. The Section Chiefs shall provide CEQ in a timely fashion with copies of major pleadings served on the government, including complaints memoranda of law, trial briefs and appellate briefs which raise claims for relief under NEPA.

B. The Division attorneys handling NEPA cases shall provide CEQ at least four work days prior to the date of filing with copies of final drafts of major pleadings including answers, memoranda of law, trial briefs and appellate briefs replying to claims for relief under NEPA. The attorney in charge shall give full consideration to incorporating the substance of the views of CEQ in drafting major pleadings containing issues arising under NEPA and in the presentation of the government's position in court. In situations involving restraining orders, stays or injunctions the four day period provided for herein may be shortened as necessary at the discretion of the attorney in charge of the case.

C. If, following consultation with his/her Section Chief, the attorney in charge of a case believes that it may be inappropriate to adopt the views of CEQ, the matter shall be referred to the Assistant Attorney General.

D. If the agency whose actions are the subject of any case objects to the adoption of any position proposed by CEQ, the attorney in charge shall, in consultation with his/her Section Chief, arrange a conference with the Agency and CEQ. If the matter is not thereby resolved, the matter shall be referred to the Assistant Attorney General.

E. The cover memorandum submitted with any document requiring the approval of the Assistant Attorney General where the interpretation or application of NEPA is in issue shall contain a notation showing what views, if any, CEQ has supplied to the Division with regard thereto.

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The purpose of these procedures is solely to obtain the views of the CEQ on the applicability and interpretation of NEPA. It is not the purpose of these procedures to obtain the views of the CEQ on other matters, such as the merits of a project involved in any case, litigation strategies, or other subjects outside the scope of this directive.

5-8.320 Handling of Appeals by Other than Staff Attorneys

The assignment of cases on appeal to attorneys in the Offices of U. S. Attorneys is determined pursuant to the provisions of USAM Title 2, Appeals, 2-3.210. At the conclusion of trial court proceedings, the report to the Division of the decision, either adverse or favorable to the government, in a case handled by the U.S. Attorney should indicate his/her preference, if any, for handling of the appeal; if the report does not indicate a preference, the Division will handle the appeal. See, USAM Title 2, Appeals, 2-2.111, 2-2.00, 2-3.220. Where a U.S. Attorney handles the appeal, a section attorney and a reviewing attorney are assigned for assistance and necessary department coordination purposes. Because briefs must be coordinated with client agencies and interested agencies prior to filing, a draft must be provided to the section and reviewing attorneys at least ten days prior to filing.

In unusual circumstances, especially where time is of the essence (e.g., some applications for stays or injunctions pending appeal and for interlocutory appeals), arrangements for handling should be made by telephone with the Chief of the Appellate Section. See USAM Title 2, Appeals, 2-2.113, 2-2.300, 2-2.310, 2-2.320, 2-3.231; Rules 5, 8, and 26, F. R. App. P.

5-8.400 [RESERVED]

5-8.500 GENERAL PROCEDURES IN APPELLATE LITIGATION

5-8.510 General

Detailed instructions with respect to the handling of appeals are set forth in Title 2 of this manual.

5-8.600 SETTLEMENT AND DISMISSAL OF CASES ON APPEAL

5-8.610 General

Reference is made to the statement of the Division relative to settlement and dismissal of cases, (USAM 5-1.600 et seq.) and to the statements of the Division's trial litigation sections. See USAM 5-2.600, 5-4.600, 5-5.600 and 5-7.600, supra.

5-8.620 Authorization for U.S. Attorneys to Handle Settlement and Dismissal Appeals

U.S. Attorneys are not authorized to settle or dismiss Land and Natural Resources Division cases on appeal, without specific Division authority. A request for authorization to settle or dismiss division cases on appeal must be directed to the Chief of the Appellate Section, who transmits the request to the appropriate Division Trial Litigation section for action, if the matter is within that section's delegated authority. If the matter is beyond that section's delegated authority, that section forwards the request, with its own recommendation, to the Deputy Assistant Attorney General, who will act on the request or refer the matter to the Assistant Attorney General.

In a case where the Solicitor General has determined that no appeal will be prosecuted by the government and the appeal has not been docketed in the court of appeals, the Appellate Section requests the U.S. Attorney to dismiss the appeal in the district court. If the appeal has already been docketed in the court of appeals, the Appellate Section itself files a motion to dismiss the appeal in the court of appeals. See Rule 42, Federal Rules of Appellate Procedure.

5-8.630 Settlements Requiring Approval of Solicitor General

Special Attention is directed to 28 C.F.R. §0.163, Subpart Y, Chap. I:

§0.163 Approval by Solicitor General of action on compromise offers in certain cases.

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In any Supreme Court case the acceptance, recommendation of acceptance, or rejection, under §0.160 [Offers which may be accepted by Assistant Attorney General], §0.161 [Recommendations to Attorney General of acceptance of certain offers], is §0.162 [Offers which may be rejected by Assistant Attorney General], of a compromise offer by the Assistant Attorney General concerned, shall have the approval of the Solicitor General. In any case in which the Solicitor General has authorized an appeal to any other court, a compromise offer, or any other action, which would terminate the appeal, shall be accepted or acted upon by the Assistant Attorney General that the principles of law involved do not require appellate review in that case.

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5-9.000 THE POLICY, LEGISLATION AND SPECIAL LITIGATION SECTION

5-9.001 Establishment

The Policy, Legislation and Special Litigation Section was created on March 16, 1979, by Land and Natural Resources Division Directive No. 4-79.

5-9.100 AREA OF RESPONSIBILITY

5-9.110 General

The Policy, Legislation and Special Litigation Section performs policy planning for the Division including review of existing policy and programs, analysis and initiation of new policy, revision of management systems and integration of policy changes in budget submissions. This Section also drafts proposed legislation, reviews and reports on bills of interest to the division and develops litigation programs designed to meet new nonroutine problems. Most of the special litigation is developed when a client agency presents a set of legal problems of a unique nature that have not been previously dealt with in the routine program of the Division. In this regard, Policy, Legislation and Special Litigation is also responsible for the filing of amicus curiae briefs in cases involving issues which affect the Land and Natural Resources Division's areas of responsibility, unless those cases are specifically assigned to the Appellate Section.

5-9.120 Statutes Administered

The Policy, Legislation and Special Litigation Section is not limited to a specific area of statutory responsibility. Rather, the section supervises and conducts litigation arising under numerous federal statutes, as well as under treaties and agreements with Indians, Executive Orders, regulations of the various departments and agencies, the common law, and the laws of the various States. In addition, the section is responsible for administering and/or conducting congressionally mandated studies and reports, such as those required by section 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 et seq., the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. §2021 & 7901 et seq., and the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §3601 et seq.

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5-9.200 ORGANIZATION

5-9.210 General

The Section is administered by a Chief and Assistant Chief. The work of the Section is assigned among staff attorneys according to experience and workload.

5-9.300 SUPERVISION AND HANDLING OF THE POLICY, LEGISLATION AND SPECIAL LITIGATION SECTION CASES

5-9.301 Requests for Instructions

All requests for instructions and guidance relating to the prosecution or defense of actions under the jurisdiction of the Policy, Legislation and Special Litigation Section shall be referred to the Chief of the Policy, Legislation and Special Litigation Section of the Land and Natural Resources Division of the Department of Justice, Washington, D.C. 20530 (202-633-2586).

5-9.320 Actions Not Subject to Direct Referral to United States Attorneys

Responsibility for handling of cases under the supervision of the Policy, Legislation and Special Litigation Section is assigned by the Chief of the Section under the provisions of USAM 5-1.322 through 5-1.326, supra.

5-9.321 Prior Authorization Needed to Initiate Action

No case under the supervision of the Policy, Legislation and Special Litigation Section may be initiated by a U.S. Attorney without the prior authorization of the Assistant Attorney General, who shall sign the complaint prior to its being filed. See USAM 5-1.302, supra.

5-9.400 [RESERVED]

5-9.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-9.510 General

The general instructions set forth in USAM 5-1.500 et seq., supra, with respect to handling of litigation apply in every respect to the litigation of the Policy, Legislation and Special Litigation Section.

5-9.600 SETTLEMENT AND DISMISSAL OF CASES

5-9.610 General

No claim or case under the jurisdiction of the Policy, Legislation and Special Litigation Section may be settled or dismissed without specific or delegated authority from the Attorney General. See USAM 5-1.600 et seq., supra.

5-9.620 Transmittal of Compromise Offer to Policy Legislation and Special Litigation Section; Recommendations with Respect to Acceptance

Where compromise in a case other than a direct referral case is offered to a U.S. Attorney, he shall require the offer or to reduce the proposal to writing and to submit with it a cashier's or certified check, bank draft, or money order for the amount offered, drawn or endorsed unconditionally to the order of the Treasurer of the United States. Where a large sum is involved, a token deposit is acceptable. The U.S. Attorney then shall forward to the Department the written offer, this recommendation and the reasons therefor, and a statement of the debtor's financial status.

The recommendation should be guided by the principles that compromise offers cannot be accepted unless (a) there is doubt as to whether judgment can be secured for an amount larger than that offered in compromise, (b) there is doubt as to whether an amount larger than that offer can be collected, although a judgment has been or can be secured, or (c) the probable cost of collection exceeds the difference between the amount recoverable and the amount offered.

The financial statement need not be forwarded where the offer is recommended for acceptance solely because there is doubt as to whether judgment can be secured for an amount larger than that offered or because the probable cost of collection exceeds the difference between the amount offered and the amount recoverable.

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5-9.630 Authority of U.S. Attorneys to Settle or Dismiss Direct Referral Cases

The authority of U.S. Attorneys to settle or dismiss direct referral cases under the supervision of the Policy, Legislation and Special Litigation Section is set forth in USAM 5-1.630, supra.

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5-10.000 THE WILDLIFE AND MARINE RESOURCES SECTION

5-10.001 Establishment

The Wildlife Section was established on November 8, 1979, by Land and Natural Resources Division Directive No. 22-79. The Marine Resources Section was established on November 5, 1969, by Land and Natural Resources Division Directive No. 6-691. The consolidated Wildlife and Marine Resources Section was established on June 15, 1981, by Land and Natural Resources Division Directive No. 1.

5-10.100 AREA OF RESPONSIBILITY

5-10.110 General

The Wildlife and Marine Resources Section has responsibility for prosecuting, defending, supporting, and coordinating the prosecution and defense of all civil and criminal cases, matters, and proceedings arising under the laws listed below (see USAM 5-10.120, infra).

5-10.120 Statutes Administered

The federal statutes giving rise to litigation handled by the Section include the following:

- A. Endangered Species Act of 1973, 16 U.S.C. §1531 et seq.
- B. Lacey Act, 16 U.S.C. §3371 et seq.
- C. Airborne Hunting Act, 16 U.S.C. §742j-1
- D. Migratory Bird Treaty Act, 16 U.S.C. §703 et seq.
- E. Migratory Bird Conservation Act, 16 U.S.C. §§715-715d, 715e, 715f-715k, 715l-715r
- F. Bald and Golden Eagle Protection Act, 16 U.S.C. §§668-668d
- G. Dingell-Johnson Fish Restoration Act, 16 U.S.C. §§777-777i, 777k
- H. National Wildlife Refuge System Administration Act, 16 U.S.C. §§668dd, 668ee
- I. Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §1431 et seq.
- J. Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1801 et seq.
- K. Whaling Convention Act, 16 U.S.C. §981 et seq.

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- L. Atlantic Tunas Convention Act, 16 U.S.C. §971
- M. Tuna Convention Act, 16 U.S.C. §951 et seq.
- N. Marine Mammal Protection Act, 16 U.S.C. §1361 et seq.
- O. Sockeye Salmon or Pink Salmon Fishing Act, 16 U.S.C. §776 et seq.
- P. Fur Seal Act of 1966, 16 U.S.C. §1151 et seq.
- Q. Protection of Sea Otters on the High Seas Act, 16 U.S.C. §1171 et seq.
- R. Wild Free Roaming Horses and Burros Act, 16 U.S.C. §§1331-1340
- S. Fish and Wildlife Coordination Act, 16 U.S.C. §§661-667e
- T. Animal Damage Control Act, 7 U.S.C. §426 et seq.
- U. Sponge Act, 16 U.S.C. §781 et seq.
- V. Northern Pacific Halibut Act, 16 U.S.C. §772 et seq.
- W. Northern Pacific Fisheries Act, 16 U.S.C. §1021 et seq.

5-10.200 ORGANIZATION

5-10.210 General

The section is administered by a Chief and an Assistant Chief. The work of the Section is assigned among staff attorneys according to experience and workload.

5-10.300 SUPERVISION AND HANDLING OF WILDLIFE AND MARINE RESOURCES SECTION CASES.

5-10.301 Request for Instructions

Requests for instructions and guidance relating to the prosecution or defense or actions under the jurisdiction of the Section shall be referred to: Chief, Wildlife and Marine Resources Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530 (202-724-7352).

5-10.310 Authority of United States Attorneys to Initiate Actions Without Prior Authorization, i.e., Direct Referral Cases

The general authority of U.S. Attorneys to initiate cases under the supervision of the Wildlife and Marine Resources Section is set forth in USAM 5-1.310. Cases which do not raise new or unusual questions of law may be initiated by the U.S. Attorney without prior authorization from the

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Section in response to a direct request in writing from an authorized field officer of the department or agency concerned.

Provided that upon receipt of referrals of any case within the jurisdiction of the Section, notice shall be given to the Section before filing or declining to file an action, as set forth in USAM 5-10.312, infra.

Provided that U.S. Attorneys are not authorized to commence actions against foreign vessels or foreign fishermen under the Magnuson Fishery Conservations and Management Act, 16 U.S.C. §1801 et seq., without prior telephonic approval from the Section. The views of the U.S. Attorney for a district to which a foreign vessel may be brought will be ascertained in advance of seizure by the Coast Guard. The U.S. Attorney should then contact the Section to discuss the complaint to be filed, release bond and inventory arrangements.

5-10.312 Notice to Wildlife and Marine Resources Section of Intention to File Direct Referral Action

No later than three (3) business days prior to instituting or declining to institute a direct referral action arising under the jurisdiction of the Section, the Chief of the Section shall be notified of the proposed action, and copies of relevant documents shall be forwarded in due course. This notice and document forwarding requirement is waived when, for example, a case involves routine enforcement of the Migratory Bird Treaty Act or ordinary forfeiture proceedings not concerning wildlife or associated articles of significant value.

The notice requirement is applicable where, for example, a case involves a conspiracy to violate the import or export provisions of the Endangered Species Act, the Marine Mammal Protection Act, or the Lacey Act; a multi-jurisdictional conspiracy involving the interstate trading in wildlife or wildlife parts and products in violation of Federal Wildlife or Marine Resources Law; a violation of the felony provisions of the Lacey Act or the Migratory Bird Treaty Act; any litigation involving the Wild Horses and Burros Act. If there is doubt as to whether notice and document forwarding is necessary, inquiry to the Section is appropriate.

5-10.320 Actions Not Subject to Direct Referral to U.S. Attorney

Responsibility for the handling of cases under the supervision of the Wildlife and Marine Resources Section is assigned by the Chief of the Section under the provisions of USAM 5-1.322 through 5-1.326.

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5-10.321 Prior Authorization Needed to Initiate Action or Assume Defense of Action

Except for cases authorized to be filed upon direct referral, (see USAM 5-10.310, supra), no case under the supervision of the Wildlife and Marine Resources Section may be initiated by a U.S. Attorney without prior authorization (see USAM 5-1.302). In all cases under the supervision of the Section in which the United States, a federal agency or agency official is a defendant, the U.S. Attorney shall inquire of the Section whether the assignment will be field, staff or joint. The U.S. Attorney shall provide notice immediately to the section of any motion for preliminary relief is filed.

5-10.400 [RESERVED]

5-10.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-10.510 General

The general instructions set forth in USAM 5-1.500 et seq., with respect to the handling of litigation apply in every respect to the litigation of the Wildlife and Marine Resources Section. Particularly, it is of the utmost importance that complaints filed against the United States, federal agencies or federal officials in matters relating to the area of responsibility of the Wildlife and Marine Resources Section be transmitted promptly to the chief of the Section.

5-10.600 SETTLEMENT AND DISMISSAL OF CASES

5-10.610 General

Except with respect to direct referral cases involving no new or unusual questions of fact or law (discussed in USAM 5-1.630), no claim or case under the jurisdiction of the Wildlife and Marine Resources Section may be settled or dismissed without specific or delegated authority from the Attorney General. See USAM 5-1.600 et seq.

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5-10.620 Transmittal of Compromise to Wildlife and Marine Resources
Section; Recommendations With Respect to Acceptance

Where compromise in a case other than a direct referral case is offered to a U.S. Attorney, he shall forward the offer to the Section along with his recommendation and supporting analysis.

The recommendation should be guided by the principle that a compromise offer should be declined unless it fairly reflects (a) doubt that the government position will prevail, (b) doubt that judgment can be secured for an amount larger than that offered in compromise, (c) doubt that an amount larger than that offer can be collected, although a judgment has been or can be secured, or (d) the probability that cost of collection will exceed the difference between the amount recoverable and the amount offered.

5-10.630 Authority of United States Attorneys to Settle or Dismiss Direct
Referral Cases

The general authority of U.S. Attorneys to settle or dismiss direct referral cases under the supervision of the Wildlife and Marine Resources Section is set forth in USAM 5-1.630.

Subject to the limitations imposed by this paragraph and section USAM 5-1.640, U.S. Attorneys are authorized, without prior approval of the Land and Natural Resources Division, to settle all direct referral actions relating to wildlife law enforcement.

Provided that telephonic notice shall be given to the Section prior to any such settlement or dismissal and copies of all relevant documents shall be forwarded to the Section. This notice requirement is waived in certain categories or cases discussed in USAM 5-10.312, supra and Section I USAM 5-1.310.

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5-11.000 THE APPRAISAL UNIT, LAND ACQUISITION SECTION

5-11.100 GENERAL

The Appraisal Unit, Land Acquisition Section, was created by Lands Division Order No. 47 dated February 1, 1951. The Chief of the Section reports directly to the Assistant Attorney General of the Division. The Appraisal Unit, formerly the Appraisal Section, is a unit of the Land Acquisition Section. The Chief of the Appraisal Unit reports to the Chief of the Land Acquisition Section.

5-11.120 Analysis of Appraisal Reports by United States Attorneys

Appraisals supplied by an agency to a U.S. Attorney in support of a request to condemn a tract of land should be reviewed as soon as the case is received. In this regard, the U.S. Attorney should satisfy himself that he has received all of the appraisals, whether approved or disapproved, from the acquiring agency. He should also insist that the review memorandums containing the critique of the appraisals and recommendations of the acquiring agency be forwarded with the appraisals. Where there is doubt in the U.S. Attorney's mind regarding the adequacy of any appraisal report, or if large sums of money are involved, the appraisal reports should be forwarded to the Appraisal Unit for analysis and recommendation. It is important that the U.S. Attorney act upon the Appraisal Unit's recommendations and do so in a timely manner. This will insure that sound and proper appraisals are at hand for early settlement negotiations or for trial purposes.

For further information with respect to the processing and review of appraisal reports by personnel of the office of the U.S. Attorneys, the Land and Natural Resources Divisions, and the acquiring agencies, see USAM Section 5-4.982 Uniform Appraisal Standards for Federal Land Acquisition, and USAM 5-4.981 A Procedural Guide for the Acquisition of Real Property by Governmental Agencies at page 7 and pages 57-59.

5-11.130 Obtaining Additional Appraisals

The U.S. Attorney should not obtain an additional appraisal report until the existing appraisals have been analyzed by the Appraisal Unit and its recommendations received. Generally, an additional appraisal report should be obtained when there is a wide divergence in the opinion of value between two appraisers and their differences cannot be reconciled by the

U.S. Attorney. It is usually desirable to obtain an additional appraisal when good market data is not available, or where large sums of money are involved. Where demolition of improvements is contemplated, or where the land is to be inundated or otherwise changed soon after the filing of condemnation proceedings, it is important to secure immediately any additional appraisal which might be needed, in order that the appraiser may view the property in its original condition.

For further guidance on obtaining additional appraisals, see USAM 5-4.981, A Procedural Guide for the Acquisition of Real Property by Governmental Agencies at pages 34-37.

5-11.140 Selection of Qualified Appraisers and Other Experts

The selection and approval of appraisers and other experts is a joint effort of the U.S. Attorney and the Appraisal Unit. U.S. Attorneys should insist that the acquiring agencies which they represent use only appraisers who have been approved by the Department as being acceptable for presentation of expert testimony. Where appraisers who are not adequate for this purpose are employed, money is wasted, since it will be necessary to expend more money for additional appraisals of the same property, and the government may be required to change estimates of value in midstream, thereby impairing settlement opportunities. Where full cooperation is not being received from an acquiring agency in regard to the employment of experts, the matter should be referred to the Assistant Attorney General, Land and Natural Resources Division, for resolution.

5-11.150 Fees for Appraisers and Other Expert Witnesses

Where expert witnesses' services are necessary, the U.S. Attorney must insure that the proposed fee is no more than the customary price for such services in the area. Where volume appraisal work is given to an appraiser, the more advantageous fees, which are possible because of volume, should be secured. In those instances where the U.S. Attorney is uncertain as to the appropriate fee for a given assignment, or where an unusually large fee is involved, the recommendation of the Appraisal Unit should be obtained. Sound business judgment must be exercised in negotiating for services to make sure that the United States is getting full value at not more than the locally prevailing rates. Witness fees must be on a daily rate basis and per diem rates should be accurately prorated to the fraction earned, unless circumstances make this unfair. Fees for appraisal reports should be negotiated on a flat fee basis.

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Introductory: In the instant revision of this Procedural Guide, preferred procedures for coordinating agency appraisal and precondemnation negotiation responsibility with litigative responsibility of the Department of Justice are set out in summary, outline form in the text of this brochure. Suggestions for the guidance of acquiring agency personnel with respect to planning and carrying out the land acquisition process are included in Appendix A, *infra*, pages 32, 34.

I

INITIAL STEPS TO BE TAKEN BY THE ACQUIRING AGENCY PRIOR TO ACQUISITION OF THE LAND

A. INITIAL PLANNING

1. *Necessity for acquisition must be determined by agency legal officer in following ways:*

a. *Availability of other suitable land.*—It should be ascertained whether available federally owned land could be used for project in lieu of land contemplated for acquisition.¹

b. *Need for estate or interest proposed for taking.*

(1) The character of the estate or interest needed for primary purpose should be determined and categorized in the manner suggested by form 1, appendix B, *infra*, page 40. In this connection, when the nature of the estate required is such that the Government is likely to have to pay substantially the fee value of the land, the fee simple title should normally be acquired.²

¹ If such land exists, arrangements should be made for the transfer of its use to the proposed project. In this connection, it should be borne in mind that a revocable license or permit does not constitute property for which the United States is liable upon condemnation, and passes to the licensee or permittee no estate or interest in the land. *Eg. Acton v. United States*, 401 F. 2d 896 (C.A. 9, 1968) and authorities there cited. Accordingly, if the property to be acquired includes lands being used under a revocable license or permit issued by a Federal agency [e.g., grazing permits, uranium prospecting permits, bridge franchises, licenses to erect river and harbor structures, permits to erect and maintain telephone and power lines, licenses to occupy, lease, or sell fishing areas (supporting authorities are cited in *Osborne v. United States*, 145 F. 2d 892, 896 fn. 5 (C.A. 9, 1944) and in *Action v. United States*, 401 F. 2d 896 (C.A. 9, 1968)], the agency desiring to acquire the use of the property should make arrangements (a) for the revocation of the revocable license or permit by the Federal agency issuing the revocable license or permit and (b) for such use rights in the property as are appropriate. The General Services Administration annually compiles and issues an inventory of Federal real property holdings.

² See e.g., the express provisions in this respect set out in the joint policy statement of the Department of the Army and the Department of the Interior relative to reservoir project lands (27 F.R. 1784).

(1)

(2) Coordination of project with other agencies should be considered to utilize remainder interests and avoid severance damage payments.³

(3) Consideration should be given to providing access, water, etc., to severed properties, if consistent with purpose of taking, to minimize severance damages. Similar consideration might be given to excepting mineral interests.

c. *Consideration should be given to the ultimate cost of interests taken.*—A term for years may be cost-justified if the property is likely to be used for short-time intervals; it cannot be cost-justified if the terms are to be successively extended.

2. *Legislative authority for acquisition must be established in the following particulars:*

a. *The statutory basis for operating the program for which property will be used.*

(1) Authority for acquiring land.

(2) Appropriation from which just compensation is to be paid and limitations on the amount that can be spent for land acquisition.

(3) If fund is limited, a finding should be made as to whether a taking is required for an essential public purpose before just compensation is determined in condemnation proceedings.⁴

b. If defects in the agency's authority to condemn are found, or if the extent of that authority is unclear, it is recommended that clarifying legislation or an explicit authorization in an appropriation act be obtained before acquisition of properties is commenced.⁵

3. *Procure Surveys and Maps.*

a. *Planning map.*—A planning map on one sheet should be prepared showing the following:

(1) Exterior boundaries of the real property to be acquired and the parcels therein.

(2) The general location of major improvements and structures.

³ Sec. 301(9) of Pub. L. 91-646, approved Jan. 2, 1971, 84 Stat. 1894, 1905, provides as follows:

"(9) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property."

⁴ Typical limiting statutes, and certifications required to accompany requests for condemnation, are set out at p. 23, *infra*. A discussion of problems created by conditions precedent in authorizing acts appears in Appendix A, *infra*, pp. 32.

⁵ For a discussion and citation of authorities relating to statutory authorization to condemn, see *1 Federal Condemnation Handbook*, sec. 1.100. For guidelines with respect to the right of the Government to acquire lands by donation or purchase subject to various reverter conditions, options, and use restrictions, see Regulations of the Attorney General issued on October 4, 1970, pursuant to Pub. L. 91-303, approved September 1, 1970, 84 Stat. 835 and page 4, *infra*.

(3) The location of proposed Government construction. This map should show the general outlines of the construction areas appropriately identified (runways, barracks and administration areas, housing areas, etc.). In any acquisition of real property where the requirement is based on technical criteria (such as airfields, ammunition storage areas, and communication stations), the planning map should show such criteria schematically .

(4) The location of existing rights-of-way for roads, highways, railways, utilities, etc.

(5) The proposed route of relocation of any of the rights-of-way mentioned in (4) above. If the proposed route of any proposed relocation of a right-of-way lies too great a distance from the real property proposed for acquisition to be shown on this map, the proposed relocation routes should be shown in the vicinity map.

(6) The approximate location and direction of flow of natural water courses.

(7) A small-scale location insert showing the general location of real property.

(8) Any other pertinent information having a bearing on plans for the acquisition of the real property.

In order that project limits may be ascertained and difficult enhancement questions avoided, the maps should be sufficiently broad to include all property for which project use is a foreseeable possibility. Such other maps should be prepared as will be helpful in determining the type of terrain, the vicinity of the land, and its location in connection with the existing and proposed facilities.

b. *Map legend.*—Since any map is merely for intragovernment use, is not expressive of the final project, and cannot be relied on by landowners to indicate enhancement they may expect or special damage they may suffer, e.g., from proximity to a possibly harmful feature, all maps should be marked "This map is illustrative only. It does not, of itself, define the final approved project."

4. *Prepare Project Plans of Operation.*

In reservoir projects where flowage easements are acquired, there should be clearly designated plans of operation to avoid multiple litigation for subsequent changes in operation under the original project authorization.

B. PROCUREMENT OF TITLE EVIDENCE

1. *Agency to obtain title data expeditiously.*

An agency which has authority to acquire land should obtain all necessary title data for use in negotiations for purchase and later, if necessary, for use in condemnation proceedings.

2. *Use of Standards of Department of Justice.*

Title evidence obtained should conform to "Standards for the Preparation of Title Evidence in Land Acquisitions by the United States," issued by the Department of Justice, since the Attorney General must (with certain exceptions) approve titles and conduct condemnation proceedings, unless authority to do so has been delegated to the interested Department or Agency pursuant to Pub. L. 91-393, approved September 1, 1970, 84 Stat. 835.

3. *Contracting for Title Evidence.*

a. Contracts for title evidence should be let as soon as property needed is identified.

b. To assure the prompt delivery of the final continued abstract or final title certificate or title insurance policy, provision should be made for withholding a portion of the contract price until the actual delivery of the final form of the title evidence.

c. In condemnation proceedings where a declaration of taking has been filed:

(1) Generally it is not necessary to contract for a final certificate of title or title insurance policy when lands are acquired by the filing of a declaration of taking in a condemnation proceeding—although arrangements must be made for the continuance of the title data to disclose the pendency of the condemnation suit. Other than this exception, the standards and requirements for fee acquisition by direct purchase should be observed.

(2) Each agency will be primarily governed in all such cases by the requirements of the local representative of the Department of Justice charge with the prosecution of the condemnation proceedings, such as the necessity of obtaining an intermediate search or title certificate to cover the period from the date of the preliminary title examination to the date of the filing for recordation of either a *lis pendens* or the judgment on the declaration of taking in the local land records.

4. *Curative Data and Other Pertinent Information Not Disclosed by a Title Certificate or Abstract.*

a. The acquiring agency should obtain and furnish as specified hereinafter:

(1) Full information concerning owners, including information as to minors, incompetents, persons in possession,⁶ adverse claims encountered, and any other information usually not included in title certificates, but which has a bearing on who must be made parties to a condemnation suit. The material furnished should

⁶ In this connection, please see II-C-3-a-(1), *infra*, pp. 17, 18.

include a detailed analysis of title data and conclusion by the acquiring agency on ownership.

(2) As full information as possible regarding ownership, both in cases of direct purchase and condemnation.

(3) For the United States Attorney, without awaiting his request therefor, title curative data relating to tracts being condemned, such as affidavits of heirships, certificates as to persons in possession, or evidence of unrecorded conveyances.

b. When a title company fails to furnish promptly necessary continuation evidence in accordance with its contract, the acquiring agency should, without delay, furnish certificates of search prepared by agency personnel or by other qualified persons, or such other information as the United States Attorney may require.

C. PROCUREMENT OF APPRAISALS

1. *Compliance With Uniform Appraisal Standards.*

Appraisals should be prepared in compliance with the "Uniform Appraisal Standards for Federal Land Acquisitions" issued by the Interagency Land Acquisition Conference (1972).

2. *Number and Qualification of Appraisal Reports.*

a. In any acquisition of substantial value involving any significant need for condemnation proceedings the acquiring agency should obtain at least two appraisal reports by appraisers acceptable to the United States Attorney and meet the requirements of subparagraph 4 below.

b. Such reports should be obtained prior to any change in character of the property or use and should be reviewed and approved by the United States Attorney's office as a competent basis for expert valuation testimony prior to the *conclusion* of direct purchase negotiations whenever practicable.

c. By use of the procedure suggested, negotiations by the agency will be concluded on the same factual basis as a claim will be pressed in condemnation; it may even enable trial counsel to evaluate trial risks and participate in realistic negotiations for purchase of controverted tracts within the limits of agency compensation authority before condemnation proceedings are commenced.⁷

3. *Selection of Appraisers.*

a. The names of independent appraisers being considered should be submitted to the United States Attorney for his advance approval, thereby eliminating, in most instances, the necessity for the United States Attorney to employ another appraiser at a later date for trial

⁷ A recent directive to personnel of the Land and Natural Resources Division entitled "Preparation and Review of Appraisal Evidence for Trial" is reproduced in appendix A, *infra*, pp. 34-37.

purposes and avoid the unfavorable inferences and problems caused by changing appraisers midway in what really is a single transaction.

b. This will insure that the appraisers who will testify at a trial are able to make their inspections at an early date, before the appearance of the property is altered.

c. If unqualified appraisers are employed who cannot be used in trials, this information is frequently obtained by opposing counsel who attempt to subpoena them, or use the fact to prejudice the Government's case in trials.

4. *Appraisal Contracts and Fees.*

a. After consultation with an appropriate representative of the Department of Justice, the acquiring agency should contract for the appraiser's services for trial preparation and testifying at trial, and for "updating" the appraisal, during the initial phase of contracting for the report.

b. If the property to be acquired has timber in commercial quantities, mineral deposits, growing crops, or any other element which may increase the value of the land, care should be taken to insure that appraisers are employed who are qualified to evaluate the extent to which such timber, minerals, crops, etc., may enhance the market value of the land in that area. In the case of a highly specialized element of value such as uranium, refractory clay, or vast amounts of timber, experts in those fields should be obtained to determine amounts, quality, extractability, accessibility, commercial demand, etc. If possible, these experts should also be qualified to determine and testify to the extent to which the presence of such deposits or other elements, actually enhance the market value of the land.

c. Appraisers should be advised of the scope of appraisal desired and the guidelines set out in paragraphs 5 and 6 of this part IC; and they should specifically be instructed to consider so-called "severance damages" and project influence to assure an offset of benefits in partial taking cases, discussed *infra*, pages 7-9.

d. When it has been found advisable to employ an additional appraiser to evaluate property already appraised, such additional appraiser should conduct his investigation and prepare his report without benefit of prior appraisals to insure his arriving at an independent judgment.

e. Appraisal fees should be approved by the acquiring agency only after careful negotiation and investigation to determine whether they are reasonable in accordance with the rates customarily charged in that area for competent appraisals and valuation testimony.

5. *Appraisal Reports.*

a. Great care should be exercised that the appraisal is initially prepared on the legal basis which will be the Government's position in the event of trial. Therefore, it is suggested that where any tract presents unusual and complicated valuation or other legal problems, there should be coordination among the acquiring agency, the United States Attorney and the Land and Natural Resources Division of the Department of Justice in Washington, D.C., prior to abandonment of efforts to acquire the tract by direct purchase. Any communication between the agency and the Department should have the end in view of arriving at a consistent legal position and furnishing the appraiser at the outset with the legal guidelines which will continue to be controlling should the case go to trial.

b. The appraisal reports should be carefully reviewed with consideration given to these matters:

- (1) The appraiser's qualifications.
- (2) The factual data on which the appraisal report is based to insure that—
 - (a) an accurate plat of the property being condemned is included;
 - (b) the appraiser's evaluation is in accordance with and current to the correct valuation date and includes any pertinent market data occurring after any previous appraisal data;
 - (c) any necessary revisions have been made to reflect changes in project plans occurring up to the valuation date.
- (3) Whether the appraiser has given proper consideration in his report to the effect, if any, on market value of all easements, rights-of-way or other encumbrances which burden the land being taken, or of present zoning requirements or possible future changes therein.
- (4) The appraiser's determination of highest and best use, including—
 - (a) The basis for the determination and whether it can be supported by a showing of demand in the market for the property at that use.
 - (b) A showing, if possible, of lack of market demand or lack of economic feasibility, of any other possible uses.
- (5) Market value should be arrived at exclusive of enhancement due to the Government project.

If the project for which the property is being taken is one which increases the value of the property in its vicinity, the appraiser should be required to investigate the market (a) to determine the

time when project influence became apparent in the market, and (b) to note sales which were excluded as comparable because of project influence. See *United States v. Miller*, 317 U.S. 369 (1943); *United States v. Crance*, 341 F. 2d 161 (C.A. 8, 1965), cert. den. 382 U.S. 815. *United States v. Reynolds*, 397 U.S. 14 (1970).

(6) Benefits from the governmental project must be excluded.

(a) The Federal law is established that just compensation payable by the United States should be reduced by benefits to remaining lands arising from the governmental project. *Bauman v. Ross*, 167 U.S. 548, 584, (1897); *United States v. Miller*, 317 U.S. 369, 376 (1943); *Aaronson v. United States*, 79 F. 2d 139 (C.A. D.C. 1935); *Dick v. United States*, 169 F. Supp. 491, 494 (C. Cls. 1959); *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. 415, 416 (N.D. Ill. 1886); *United States v. Trout*, 386 F. 2d 216, 221-223 (C.A. 5, 1967); *United States v. Rands*, 389 U.S. 121 (1967). The doctrine of offsetting benefits is too often overlooked and so appraisal reports in partial taking situations should be carefully checked in this respect. This is particularly so because state law often differs with respect to the offsetting of benefits and appraisers whose experience is largely in state courts may not be familiar with this important aspect of Federal law.

(b) "A special benefit is nonetheless such because other lands in like situations are similarly benefited." *United States v. 2,477.79 Acres of Land in Bell County, Texas*, 259 F. 2d 23, 28 (C.A. 5, 1958); *Aaronson v. United States*, 79 F. 2d 139, 141 (C.A. D.C. 1935); *United States v. River Rouge Co.*, 269 U.S. 411, 415-416 (1926); *United States v. Trout*, 386 F. 2d 216 (C.A. 5, 1967); *United States v. Fort Smith River Development Corporation*, 349 F. 2d 522 (C.A. 8, 1965); *United States v. Crance*, 341 F. 2d 161 (C.A. 8, 1965); *Pokladnik v. United States*, 378 F. 2d 59 (C.A. 5, 1957), per curiam.

(c) It is important that appraisers clearly establish the facts supporting a claim of benefit to the remainder, since the extent of the benefit to a tract caused by the Federal project is a fact question. *United States v. 2,477.79 Acres of Land in Bell County, Texas*, 259 F. 2d 23, 28-29 (C.A. 5, 1958).

(7) Where only a part of a landowner's tract is taken, severance damage estimates, if any, should be supported.

(a) It should first be determined whether it will be the position of the Government on any trial of the case that the part taken is an integral part of a unitary whole within the meaning of the Federal law of eminent domain. *Sharp v. United States*, 191 U.S.

341, 354 (1903), affirming *Sharpe v. United States*, 112 Fed. 893 (C.A. 3, 1902) at p. 896; *Baetjer v. United States*, 143 F. 2d 391, 395 (C.A. 1, 1944), cert. den. 323 U.S. 772; *Cole Investment Co. v. United States*, 258 F. 2d 203, 204 (C.A. 9, 1958); *United States v. Mills*, 237 F. 2d 401, 404 (C.A. 8, 1956).

(b) There must also be unity of ownership. *United States v. Honolulu Plantation Co.*, 182 F. 2d 172 (C.A. 9, 1950), cert. den. 340 U.S. 820.

(c) There is no severance damage unless there is a diminution in the market value of the part remaining. The Federal law is that "strict proof of the loss in market value to the remaining parcel is obligatory." *Cole Investment Co. v. United States*, 258 F. 2d 203, 204 (C.A. 9, 1958); *United States v. Honolulu Plantation Co.*, 182 F. 2d 172, 179 (C.A. 9, 1950), cert. den. 340 U.S. 820; *United States v. 26.07 Acres of Land in Hempstead*, 126 F. Supp. 374, 377 (E.D. N.Y. 1954).

(d) The diminution in market value of the land remaining must be due to the taking of the part belonging to the condemnee and not to the taking of lands belonging to others. *Campbell v. United States*, 266 U.S. 368, 372 (1924); *Boyd v. United States*, 222 F. 2d 493, 494, 495 (C.A. 8, 1955); *Winn v. United States*, 272 F. 2d 282, 287 (C.A. 9, 1959).

(e) "Severance damages," like other elements of just compensation, must not be based upon speculation. *Sharpe v. United States*, 112 Fed. 893, 897 (C.A. 3, 1902), aff'd 191 U.S. 341; *Miller v. United States*, 137 F. 2d 592, 595 (C.A. 3, 1943).

(f) Any enhancement due to the project should be excluded from the value of the whole immediately prior to the taking. See (5) *supra*, page 7.

(g) Appraisers too frequently use "severance damage" as a catchall which tends to become the tail which wags the dog. Where appraisal reports have factual data such as sales, earnings, etc., to support the value of the part taken, too often so-called severance damages are simply stated as the appraiser's opinion without specification as to how he got them.

(h) A claim for severance damage by reason of an alleged "invasion of privacy" has been denied. *United States v. 69.67 Acres of Land in Oyster Bay*, 152 F. Supp. 441, 444, 445 (E.D. N.Y. 1957), aff'd *sub nom.* *United States v. Chase*, 260 F. 2d 405, 410, 411 (C.A. 2, 1958).

(8) The appraisal techniques used should be clearly explained and supported in the report.

5. *Evaluation of Appraisal Evidence.*

The market data should be evaluated in the manner provided below :

a. Prior sales of property being acquired.

(1) Since the fair market value of the property at the time it is acquired is the measure of the just compensation to be paid for it. E.g., *United States v. Miller*, 317 U.S. 369, 373, 374 (1943); *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. Toronto Nav. Co.*, 338 U.S. 396, 402-407 (1949); prior sales of the property being acquired, reasonably recent and not forced, are the best evidence of value. E.g., *Baetjer v. United States*, 143 F. 2d 391, 397 (C.A. 1, 1944), cert. den. 323 U.S. 772; *Bailey v. United States*, 325 F. 2d 571 (C.A. 1, 1963).

(2) Where the sale is between a willing buyer and a willing seller and is not so remote as to render the price of no bearing on the present market value, it is reversible error to reject evidence of such prior sale as proof of the value of the land. *United States v. Ham*, 187 F. 2d 265, 269, 270 (C.A. 8, 1951); *United States v. Certain Parcels of Land in Philadelphia (Wainwright)*, 144 F. 2d 626, 629, 630 (C.A. 3, 1944).

(3) In this connection it should be borne in mind that consideration of prior sales of the identical property has been sustained although the sales occurred several years before the acquisition by the Government. E.g., *Dickinson v. United States*, 154 F. 2d 642, 643 (C.A. 4, 1946) (sale in 1937 held properly admitted when taking was in 1943); *Lore v. United States*, 141 F. 2d 981, 983 (C.A. 8, 1944) (sale in 1933 held properly admitted when taking was in 1940); *United States v. Bechtold Co.*, 129 F. 2d 473, 479 (C.A. 8, 1942) (sale in 1925 held properly admitted when taking was in 1939). Accordingly, make certain that prior sales of the identical property are properly considered.

b. Sales of other properties.

(1) With market value being the measure of just compensation, absent transactions involving the property itself, "Sales at arms length of similar property are the best evidence of market value." *Welch v. Tennessee Valley Authority*, 108 F. 2d 95, 101 (C.A. 6, 1939), cert. den. 309 U.S. 688; *Baetjer v. United States*, 143 F. 2d 391, 397 (C.A. 1, 1944), cert. den. 323 U.S. 772. Too often in appraisal reports the sales approach has been relegated to a position as simply one of three approaches to value, with more time and attention being given to income and reproduction approaches.

(2) Consideration should be given to why and how the sales used are more nearly comparable to the subject property; and, if

the sales were of property considered to be more or less valuable than the subject property, what adjustments were made.

(3) Verification of each sale should include, whenever possible, the names of the buyer and seller, broker and/or closing attorney, deed records, book and page number, and consideration paid. Contact should be made with at least one of the parties to the transaction and the motivation for the sale should be determined, if possible, and whether it was an arm's length transaction on the open market.

(4) A concise statement should accompany each sale used showing the appraiser's reasons for considering it as a comparable, the degree of comparability, physically, economically and functionally, and any adjustments, plus or minus, in the comparison to the subject property.

(5) Whenever adequate sales data are available, other indicia of value, hereinafter discussed, should be used only as a check on the value arrived at by market data.

c. Capitalization of income.

(1) Where the sales data are not adequate and the property is income producing, capitalization of income produced by the property may be considered. It is essential in using this approach that the income and expenses be verified, and that the capitalization rate be established by the market, giving proper consideration to the type of interest being condemned and to any risks inherent in receipt of the income. It should be borne in mind that a very slight change in the capitalization rate will make a substantial change in the valuation.

(2) Too often the income approach is treated at such length that it tends to overshadow the sales data. Even when the property is income producing, if there are adequate sales of similar property to establish a fair market value there is little need to get into the capitalization of income with its great variables, such as capitalization rate, Inwood factors, gross income, effective gross income, net income before recapture, net income after all depreciation, residual techniques, etc. Such variables are generally so complicated and confusing to the evaluating body, in addition to being so subject to manipulations which are difficult to combat, that they render this approach a difficult one at best.

(3) Utmost care should be taken, in using this approach, to consider only income which the property itself will produce—not income produced from the use of the property for a business enterprise. "The question for determination by the jury is the market value of the property taken, not the damage to the business of the

owner in operating that property." *United States v. Ham*, 187 F. 2d 265, 271 (C.A. 8, 1951); *United States ex rel TVA v. Powelson*, 319 U.S. 266, 282, 283 (1943); *Stipe v. United States*, 337 F. 2d 818, 821, 822 (C.A. 10, 1964), and cases there cited; *A. G. Davis Ice Co. v. United States*, 362 F. 2d 934, 937 (C.A. 1, 1966); *United States v. Sowards*, 370 F. 2d 87, 89 (C.A. 10, 1966): "It is the land which is appropriated, and not the business conducted thereon." *Matter of City of Rochester (Smith St. Bridge)*, 234 App. Div. 583, 587, 255 N.Y.S. 801 (1932).

d. Reproduction cost new less depreciation.

(1) Albeit the least reliable indicia of value (e.g., *United States v. Certain Interests in Property in Champaign County, Ill.*, 271 F. 2d 379, 382 (C.A. 7, 1959), cert. den. 362 U.S. 974; 2 Orgel, *Valuation Under Eminent Domain* (2d ed. 1953), secs. 188-199, particularly page 57),⁸ in the case of special purpose properties—so-called "unique" properties—which are not generally bought and sold, it is sometimes necessary to resort to reproduction cost new less depreciation for want of any more reliable method of valuation to determine "market value." Churches have long been given as an example of "unique" properties not generally bought and sold, but a number of sales of churches for use as churches have occurred in the Washington, D.C., area.

(2) The reproduction cost approach should never be used "when no one would think of reproducing the property." *United States v. Toronto Nav. Co.*, 338 U.S. 396, 403 (1949); *United States v. Benning Housing Corporation*, 276 F. 2d 248, 253 (C.A. 5, 1960); *Buena Vista Homes, Inc. v. United States*, 281 F. 2d 476, 478 (C.A. 10, 1960); *United States v. 49,375 Square Feet of Land in Borough of Manhattan*, 92 F. Supp. 384, 387, 388 (S.D. N.Y. 1950), aff'd *per curiam sub nom. United States v. Tishman Realty & Constr. Co.*, 193 F. 2d 180 (C.A. 2, 1952), cert. den. 343 U.S. 928. Since this approach almost invariably tends to result in the highest possible valuation and thus to implant in the minds of the factfinding body inflated figures which are difficult to erase, it should not be used even as a check upon more reliable methods without a showing that a reasonable prudent person would consider reproduction of the property involved. *United States v. Certain Interests in Property in the Borough of Brooklyn (Fort Hamilton)*, 326 F. 2d 109, 115 (C.A. 2, 1964), cert. den. 377 U.S. 978.

⁸ There, after a rather comprehensive discussion, the author states as one of his conclusions that "structural cost should be recognized as an inferior measure of value, to be given weight only in those cases where more satisfactory evidence based on actual sales or on earning power is not available."

(3) It is important to bear in mind that, if resort is necessary to the reproduction cost method, all forms of depreciation—physical, economic and functional—must be considered.⁹ The existence of such depreciating factors is so important that where other processes are possible the reproduction approach is properly rejected, and, even when used, must be scrutinized carefully. Dangers to be avoided in considering the cost of reproduction are well summarized in *United States v. 49,375 Square Feet of Land in Borough of Manhattan*, 92 F. Supp. 384, 387, 388 (S.D. N.Y. 1950), *aff'd per curiam sub nom. United States v. Tishman Realty & Constr. Co.*, 193 F. 2d 180 (C.A. 2, 1952), cert. den. 343 U.S. 928.

6. Appraisal Analysis.

An appraisal analysis used by the United States Attorneys is set out in appendix B, *infra*, page 57. Use of this analysis by the acquiring agency will assure that the appraisals of the agency are suitable for trial. Where more than one appraisal has been obtained and there are substantial variances as to the area, quality or evaluation of the property, efforts should be made to reconcile the variances.

D. NEGOTIATION PROCEDURES AND CONTACTS WITH LANDOWNERS

1. In accordance with the requirements of section 301 of Pub. L. 91-646, approved January 2, 1971, 84 Stat. 1894, 1904, before the initiation of negotiations for real property, the head of the Federal agency must establish an amount which he believes to be just compensation therefor and make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. The head of the Federal agency concerned must provide the owner of the real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real

⁹ In his "Condemnation Appraiser's Handbook" (1938), George L. Schmutz points out (p. 78) that elements of depreciation other than physical quite commonly constitute the major part of the total depreciation found in structures. In 2 Orgel, "Valuation Under Eminent Domain" (2d ed. 1953), sec. 188, p. 3, it is stated that "other forms of depreciation—obsolescence, inadequate or excessive size, and other forms of inadaptability—are often far more significant than mere physical deterioration." This authority warns that "whenever reproduction cost is offered as evidence, the court should make every effort to assure a full deduction for those elusive forms of depreciation, obsolescence and inadequacy, that are so often disregarded by all but the most careful appraisers." *Id.* sec. 199 at p. 57. Courts have long taken occasion to stress the necessity for a sufficient deduction for depreciation. E.g., *United States v. Boston, C.C. & N.Y. Canal Co.*, 271 Fed. 877, 889 (C.A. 1, 1921); *United States v. 3.71 Acres of Land in Borough of Queens*, 50 F. Supp. 110, 112, 113 (E.D. N.Y. 1943).

property acquired and for the damages to the remaining real property must be separately stated.

2. At the initial contact, the landowners affected by a Government project should be given the pamphlet entitled "Progress, Property and Just Compensation," which is addressed to the public and describes the power of eminent domain.

3. The representative or the negotiator of the acquiring agency has perhaps the best opportunity to effect an excellent relationship with the landowners through his conduct. His patient explanations and courteous, considerate treatment of landowners can create an atmosphere which will be most desirable in getting public support with regard to the acquisition of property for a specific project.

4. Every effort should be made to convince the landowner of the competency and judgment of the appraisers who have been assigned the task of estimating the fair market value of the property and the thorough and detailed manner in which the evaluation has been completed. However, utmost caution must be exercised before permitting any Government appraisals to be examined by the landowners or their attorneys. Indiscriminate or unilateral permission to examine Government appraisals can seriously jeopardize the United States in the trial of a difficult condemnation case.

5. The negotiator must be very explicit in detailing the expenses to be incurred by the property owner in effecting a settlement, such as the requirement that all delinquent taxes and all or that portion of the current taxes which are liens on the land must be paid in accordance with the requirements of the local taxing authorities. See II-C-3c, *infra*, pp. 17-19.

6. The representative or the negotiator of the acquiring agency should be familiar with all of the benefits and payments provided for in Pub. L. 91-646, approved January 2, 1971, 84 Stat. 1894.¹⁰

¹⁰ Sec. 303 of Pub. L. 91-646, approved Jan. 2, 1971, 84 Stat. 1894, 1906, provides as follows:

"The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for—

"(1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;

"(2) penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and

"(3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier."

7. Emphasize the avenues of savings whenever and wherever possible. These savings may be pertinent and, if so, should be brought to the owner's attention:

(a) *Cost of title search*: It is not unusual in a transaction between private parties to require the seller to furnish proof that there are no legal liens against the property on the date of transfer. The Government, on the other hand, bears the expense of obtaining title evidence.

(b) *Costs for effecting transfer of title*: It is sometimes incumbent upon the owner to pay for the cost of preparing the necessary instruments to transfer his title and recording of the instruments. The Government does most of this with no cost to the owner. But see II-C-3-h-(1), *infra*, page 20.

(c) *No brokerage fees*: The majority of transactions are handled through a real estate broker with fees ranging from 3 to 10 percent. There are no brokerage fees in this transaction.

(d) *Payment in cash*: In some cases the seller does not receive the full consideration for some indefinite period of time or must accept a first or second trust (or mortgage) in order to complete the transaction. The Government will make full cash payment.

(e) *Retention of improvements may be possible*: Sometimes the owner has the option of retaining any of the improvements located on the property at their appraised salvage value.

6. Care should be taken to avoid any possible representations that the project as then planned is complete and that there will be no further need of additional property of the owner being acquired, for example, for access areas to a reservoir. Otherwise there is a risk of the Government being charged for enhancement contrary to the rule of *United States v. Miller*, 317 U.S. 369 (1948).

7. If agreement for direct purchase is reached, the negotiator should secure execution of an enforceable contract.

(a) Suggested forms of a sales contract (designated as "Offer To Sell Real Property" and "Offer To Sell Easement") are attached as forms 2 and 3 respectively, appendix B, *infra*, pages 45, 48.

(b) Conformity to local requirements will prevent later attempts to have instrument voided for failure to do so.

II

ACQUISITION BY DIRECT PURCHASE

A. INITIATING REQUESTS FOR PRELIMINARY OPINIONS OF TITLE

1. After entering into a contract for the purchase of real property, or any interest therein, a preliminary opinion of title by the Attorney General will be obtained unless the interested department or agency has received a delegation of authority to approve titles pursuant to Pub. L. 91-393, approved September 1, 1970, 84 Stat. 835 (see B, *infra*), or unless not required by statute. For this, a "Purchase Assembly," containing the following items, should be transmitted to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530.

a. Any accepted option; an executed sales, donation, or exchange agreement; or correspondence constituting an offer and acceptance.

b. Title evidence complying with the requirements set out in the "Standards for the Preparation of Title Evidence in Land Acquisitions by the United States." If the title evidence is a title certificate, report or interim binder, an extra copy thereof should be transmitted. Any analysis of title data and conclusions on ownership made on behalf of the acquiring agency should accompany the title evidence.

c. Map or plat of the land to be acquired, if available. (See pp. 2, 3, *supra*).

d. Certificates of inspection and possession, mechanics' lien claims, and other miscellaneous data consisting of documents which the agency may wish to be preliminarily considered, or which may be helpful in considering the sufficiency of the title, or explaining objections contained in the title evidence.

e. The original and a copy of the draft of the deed to the United States, if available.

f. A letter transmitting the purchase assembly, properly signed by an authorized official of the agency, which contains:

(1) A request for a preliminary opinion of title.

(2) A statement identifying the property by number of acres, parcel number, the name of the project for which it is being acquired, its location by city, county, and state, the name of the vendor, and the consideration to be paid for the property.

(3) A citation of the pertinent authorization and appropriation acts.

(4) Any additional comment or information which may be helpful in considering the sufficiency of the title.

2. A preliminary opinion will then be rendered and sent to the agency or its designated representative with the purchase assembly.

B. APPROVAL OF TITLES BY CERTAIN DEPARTMENTS AND AGENCIES

When the interested department or agency has received a delegation of authority to approve titles, subject to the general supervision of the Attorney General pursuant to Pub. L. 91-393, approved September 1, 1970, these departments and agencies must comply with the regulations issued by this Department on October 2, 1970. General criteria governing the established principles in approving the title to real property being acquired by the United States are set out in these regulations.

C. CLOSING A DIRECT PURCHASE ACQUISITION

1. If the Department of Justice is to handle the closing of a direct purchase acquisition:

a. The request from the agency to close the transaction should comply with the following:

(1) Enclose the purchase assembly, including the title evidence, contract of sale, copy of the preliminary opinion, draft of deed and related papers, and, unless an exchange or donation, a Treasurer's check for the full amount of the purchase price set forth in the contract.

(2) Make reference to and identify the enclosed check.

(3) Respond to the request for waivers as to outstanding oil, gas or mineral interests or easements if it is determined that such interests or rights will not interfere with the contemplated use of the property, and respond to the request for specific information necessary for use at the closing.

(4) Advise the name and address of its field representative who is to assist the closing attorney, at or before the closing, arrange for the payment of the costs for the recordation of the deed to the United States if the Government is to pay such costs (see 3-g, *infra*,

p. 20), and state who is to take possession of the property in behalf of the acquiring agency.

2. If the closing of the purchase is by a closing attorney of an agency which handles its own closing: The field representative or closing attorney should follow strictly the closing procedure set out in the respective manuals prepared by his agency for such purpose, and the specific instructions received from his agency.

3. Action required for closing by either the Department of Justice or agency attorney:

a. Inspection of Property Immediately Prior to the Closing:

(1) Immediately prior to the closing of the purchase, the premises being acquired should be inspected by either the closing attorney, his assistant, or an authorized employee of the acquiring agency, for the purpose of ascertaining the rights or claims of persons in possession, and any unrecorded mechanics' liens for work or labor performed or material furnished within the statutory period. The result of this inspection should be evidenced by the execution of the Certificate of Inspection and Possession (form 4, appendix B, *infra*, p. 50).

(2) If any person is found in possession, his rights in the property should be determined and a duly executed disclaimer (form 5, appendix B, *infra*, p. 50) should be obtained.

(3) If the inspection discloses buildings or improvements which have been reserved by and are to be removed by the vendor subsequent to the closing, then a proper commitment or a clearance bond, if circumstances so require, should be obtained to assure such removal.

(4) If the inspection discloses any other questionable objection or outstanding right, such question or right must be eliminated or the matter should be reported to the Land and Natural Resources Division before the delivery of the check.

b. Preparation of Closing Statement:

(1) A closing statement (form 6, appendix B, *infra*, p. 53) should be prepared covering in detail all charges to be deducted from the purchase price check, including all taxes and assessments constituting liens against the property, regardless of whether the amount of such taxes and assessments have been determined; outstanding judgments, both State and Federal; mortgages or deeds of trust; Internal Revenue stamps; amounts reserved under any performance or other bond for title requirements affecting the property; and all liens, statutory or otherwise.

c. Tax Liens or Assessments Not Payable on Date of Closing:

(1) If the closing is had after taxes or other assessments become a fixed or inchoate lien but are not payable, or the amounts thereof are not determinable at the closing, adequate provision must be made to assure the payment thereof.

(2) If the amount of such taxes and assessments are determinable, then a certified check from the vendor payable to the proper taxing authority should be held. If such amount is not determinable at the closing, an estimate thereof should be made after consultation with the proper taxing authority, and a certified check obtained from the vendor for a sum not less than the amount of the taxes or assessments on the property for the preceding year, plus 20 percent thereof, payable to the proper taxing authority.

(3) In the event the vendor is unwilling or unable to provide such check, the required amount in the form of a cashier's check payable to the proper taxing authority should be withheld from the purchase price.

(4) When these undetermined taxes and assessments become due, after obtaining an official tax statement, the certified check or cashier's check should be promptly forwarded to the tax collector, with the request that the tax receipts be returned to the sender with his check, payable to the vendor, in the amount of any refund due.

(5) The receipted tax bill, together with advice that any refund has been made, should be forwarded to the "acquiring agency" for inclusion in the purchase assembly, and a copy of the transmittal letter forwarded to the Land and Natural Resources Division for its records.

d. Exception Where Title Company Assumes Responsibility for Outstanding Taxes:

Where the evidence of title consists of a title certificate or insurance policy, and funds are withheld for payment of taxes, the amount so withheld may be turned over to the title company, provided the company will agree to issue a final title certificate or policy in which no tax lien or unpaid taxes will be noted, or if noted, will be followed by the statement "for the payment of which provision has been made by the deposit of a sufficient sum with this company." The title company will enter into an escrow agreement with the vendor to hold such sum for the satisfaction of the taxes until they are due, and to return any excess to the vendor.

e. Preparation and Execution of Deed to the United States:

When all objections to the title and all requirements noted in the preliminary title opinion have been satisfied, and any subse-

quently discovered adverse claim has been disposed of, the deed of conveyance to the United States prepared in compliance with the requirements set out in "Standards for the Preparation of Title Evidence in Land Acquisitions by the United States" prepared by the Land and Natural Resources Division should be executed, sealed and attested, where locally required, and acknowledged by the grantor and his spouse as would be the case of a private transfer under local law.

f. Documentary and Other Tax Stamps:

Prior to the recordation of the deed to the United States, there should be affixed thereto all documentary stamps required in the state in which the property is located.

g. Recording Deed to the United States:

(1) If the cost for such recording is not otherwise provided for, the recording fee is to be paid by the Government, in either of the following ways:

(a) If the acquiring agency has a field representative attending the closing, the representative will arrange for the payment of such cost.

(b) Otherwise, since the Department of Justice has no authority to make such payment, the closing attorney should request the recorder of deeds to execute a voucher on form S-1034, and forward the same to the acquiring agency for payment.

(2) The required form and the name and address of the acquiring agency should be furnished the recorder.

h. Release of Mortgages, Deeds of Trust and Judgments:

(1) Prior to or at the time of closing, all mortgages, deeds of trust, judgments and all other encumbrances referred to in the preliminary title opinion, or discovered subsequent to the date of the preliminary title evidence and prior to the date of the recordation of the deed to the United States, should be satisfied, released or discharged, of record.

(2) Fees for the recordation of these instruments or other curative material, such as recordable affidavits, must be paid by the vendor.

i. Delivery of Treasurer's Check to Vendor:

(1) The purchase money check or the balance thereof in a cashier's or certified check payable to the vendor may be delivered to him, after:

(a) All objections to the title and requirements contained in the preliminary title opinion have been eliminated, and instru-

ments releasing all liens or encumbrances on the property and the executed deed to the United States have been recorded.

(b) The closing attorney has been advised by the abstractor or the title company, as the case may be, that the records have been rechecked to a date subsequent to the recordation of the deed to the United States, and the continuation evidence will show title to the property vested of record in the United States of America, subject only to those objections which have been administratively determined to be acceptable to the Government and have been waived as indicated in the closing instructions, and he has ascertained in the event the title evidence is to be a title certificate or a title insurance policy, that such certificate or policy, together with an extra copy thereof, will be issued in the form set out in the above-mentioned "Standards."

j. Delay in Closing a Direct Purchase:

(1) If, for any reason, the transaction cannot be closed within 30 days from the receipt of the purchase price check, the closing attorney should report such delay to the Land and Natural Resources Division, or to the interested agency if the closing is assigned to its representative, giving the reason for the delay, and stating when it is anticipated that the purchase will be closed.

(2) If for any reason the transaction cannot be closed, the closing attorney should return the purchase assembly and all related papers, together with the Treasurer's check to the designated officer or his agency, explaining fully the reasons for their return and recommending further action. Prompt action is necessary because delay may give the owner excuse to repudiate his contract. *United States v. 2,974.49 Acres in Clarendon County, S.C.* 308 F. 2d 641 (C.A. 4, 1962).

C. FINAL TITLE ASSEMBLY REQUIRED FOR A FINAL TITLE OPINION BY THE ATTORNEY GENERAL

1. Upon receipt of the recorded deed to the United States, or a true copy thereof in the event the time required for its recordation unduly delays the transmittal of the Purchase Assembly, and the final title evidence showing title vested in the United States, such documents should be reviewed by the closing attorney. If found satisfactory, the completed purchase assembly, consisting of the following items, should then be forwarded to the Land and Natural Resources Division:

(a) All data constituting the contract of sale, donation or exchange, together with the plat or map of the property if available;

(b) Final title evidence, including the original of any certificate or policy; abstracts; etc.;

(c) Original or a true copy of the deed of conveyance to the United States;

(d) Certificate of Inspection and Possession extended to the date of closing and accompanying executed disclaimers, if any;

(e) Vendor's receipt for the purchase money; itemized closing statement; and the vendor's commitment or performance bond, if any, assuring the clearance of the site;

(f) Miscellaneous and related documents, such as affidavits, copy of pertinent portions of articles of incorporation, resolutions authorizing sale, certifications as to corporate standing, and all other related data obtained to show the elimination of the objections and the meeting of the requirements contained in the preliminary title opinion;

(g) Either the transmittal letter or an accompanying statement should explain how each objection or requirement set out in the preliminary title opinion, or subsequently disclosed by a continuation search, has been met;

(h) If the original deed is not forwarded with these papers, it should be submitted as early as possible.

2. A final opinion rendered by the Attorney General is delivered to the agency with all data and title evidence.

III

ACQUISITION BY CONDEMNATION PROCEEDINGS

A. MATERIAL AND INFORMATION TO BE FURNISHED WITH REQUEST FOR CONDEMNATION

The Act of August 1, 1888, 25 Stat. 347, 40 U.S.C. sec. 257, provides in pertinent part:

* * * in every case in which * * * any * * * officer of the Government has been, or hereafter shall be, authorized to procure real estate * * * he shall be * * * authorized to acquire the same for the United States by condemnation * * * and it shall be the duty of the Attorney General of the United States, upon every application * * * to cause proceedings to be commenced for condemnation * * *

Thus, the Attorney General shall institute proceedings to acquire land upon a determination of a need therefor by an acquiring agency.

To conduct condemnation proceedings properly, and to insure an ultimate conclusion which is just both to the public and the landowners, the Attorney General must be fully apprised of the background of the request for the taking. The following procedure is suggested as an aid to this end.

1. A request for acquisition of property by condemnation must be initiated by letter to the Attorney General signed by the head of the acquiring agency or his authorized representative containing the following in addition to the materials specified in paragraphs 2, 3 and 4 as appropriate:

(a) Statement that the Agency Head has determined that the taking is necessary for the particular project. (If the request for acquisition is by an authorized representative rather than by the Agency Head, a recitation of the delegation of authority should be included.)

(b) Statement whether immediate possession is needed for public purposes, or specification of date when possession is required together with information as to who will assume management responsibilities of the property when possession is obtained.

(c) Before requesting possession of real property, compliance must be had with the provisions of Pub. L. 91-646, approved

January 2, 1971, 84 Stat. 1895, with particular attention being given to Subsections 301(4) and 301(5), which provide as follows:

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 1 of the Act of February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a), for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by title II will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

It is not considered that the provisions of Section 301(5) will affect the right to immediate possession of properties where, without awaiting the 90-day period, motions for possession are filed to obtain possession of small portions of ranches, farms or other large properties and the owner or the person in possession may retain possession of a sufficient portion of the property in order fully to enjoy the possession of his home and there will be no interference with the operation of his business or farm.

(d) Statement whether declaration of taking is desired, in manner provided in 40 U.S.C. § 258a.

(e) A statement, where applicable, showing compliance with the provisions of Section 102(C) of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 52 U.S.C., sec. 4321 *et seq.*, and the National Historic Preservation Act of 1966, 80 Stat. 915, 16 U.S.C., sec. 470.

(f) Designation of field representative to receive copies of instruments filed, to provide certificate of inspection and possession, and with whom action concerning the proceeding should be coordinated.

(g) Where an act authorizing acquisition of property for a Federal project limits the taking to lands described by metes and bounds (e.g., Act of Sept. 28, 1962, 76 Stat. 650; Act of Sept. 9, 1959, Sec. 8a, 73 Stat. 479, repealed by Act of June 8, 1962, Sec. 1, 76 Stat. 92) or otherwise limits the taking by reference to maps, etc. (e.g., Act of Oct. 18, 1968, 82 Stat. 1188; Act of Sept. 11, 1964, 78 Stat.

928), or requires the consent of the state legislature (e.g., see 16 U.S.C. sec. 516), or precludes depriving owners of the use and occupancy of their property without their consent for a specified period of years (e.g., Act of Aug. 7, 1961, Sec. 4(a)(1), 75 Stat. 284, 288), or contains any other conditions precedent, the request for condemnation should include a certification that the taking complies with the limiting conditions in the authorizing act.

(h) Where the authorizing act contains a monetary limitation (e.g., Act of Aug. 6, 1956, 70 Stat. 1066; Act of Sept. 11, 1964, 78 Stat. 928, 933; Act of Aug. 7, 1961, 75 Stat. 284, 293; Act of Sept. 13, 1962, 76 Stat. 538, 541; Act of Sept. 28, 1962, 76 Stat. 650, 652), the request for condemnation should include a statement that, in the opinion of the requesting official, the acquisition should not exceed the limits prescribed by law.¹¹

2. If the request for acquisition directs the filing of a declaration of taking, the letter shall be accompanied by the original and three copies of a declaration of taking.

The requirements of a declaration of taking are set forth in Title 40 U.S.C. sec. 258a. A suggested form of a declaration of taking, with exhibits "A" and "B", is attached as form 7, appendix B, *infra*, page 54.¹² Also submit a check representing estimated compensation for deposit in registry of court or advice as to who will furnish it.¹³

¹¹ Where there is doubt as to whether the award will be within the prescribed monetary limitation, the request should be for the filing of a complaint only, unaccompanied by a declaration of taking. For your guidance, a discussion of problems in this area is included in app. A, *infra*, pp. 32-33.

¹² In complying with the requirements of 40 U.S.C., sec. 258a, the following precautions should be taken: In the statement of the authority for the taking all acts of Congress granting such authority should be cited, together with sufficiently broad language to embrace any pertinent statute. (E.g., "and acts supplementary thereto and amendatory thereof.") Please include in the cited authorities any acts appropriating funds for acquisition of the property. Also, in stating the public use for which the property is taken, as a precaution, language should also be included in terms sufficiently broad to obviate any future question. (E.g., "and for other uses incident thereto" and "for such other purposes as may be necessary in connection with said project.") If the project is an existing one, please state the date the original project was authorized, whether the property now being acquired was included within the scope of the original authorization, and if not, the date the present acquisition was authorized.

In stating the amount estimated to be just compensation, please note that in view of the holding that "a blanket estimate and deposit covering several parcels and not attended by allocation among them is not an effective tender of any sum for any parcel" for the purpose of curtailing interest (*United States v. 355.70 Acres in Rockaway and Jefferson Townships*, 327 F.2d 630, 632 (C.A. 3, 1964)), allocation of a specific sum or portion of the total deposit should be made for each tract. In this connection, it should be noted that the cited case goes no further than to hold that the deposit must be allocated among tracts taken and does not—and should not—require suballocation as to particular interests within a tract.

¹³ Sufficient additional copies of the exhibits attached to the declaration of taking should be furnished directly to the United States Attorney for attaching to the instruments filed in the condemnation proceeding. The number of copies will be dependent upon the number of tracts to be included in the proceeding and the number of defendants, plus 10 others for attachment to various instruments.

3. If the property is to be acquired by condemnation without a declaration of taking, the request shall be accompanied by:

(a) Statement of authority under which the land is to be taken,¹⁴ the act appropriating funds for the acquisition, the public use for which the lands are to be acquired,¹⁵ the estate or interest to be acquired and a description of the land sufficient for the identification thereof.¹⁶

(b) A plat or map showing the land to be taken including the following:

(1) The exterior boundaries of the property to be acquired and the parcels therein properly numbered.

(2) The descriptions shown on the map must agree with the written descriptions in all particulars.

(3) The general location of major improvements and structures situated on the lands to be acquired.

(4) The location of existing rights-of-way for roads, highways, railroads, utilities, and for other purposes.

(5) The proposed route of relocation of any of the rights-of-way mentioned in (4) above.

(6) The approximate location and direction of the flow of natural water courses, if the land to be acquired is in an area where water may become an issue.

(7) All easements, if feasible.

4. If the value of the land to be acquired is estimated to be \$4,000 or less, the request should be accompanied by a statement as to the need for condemnation.

5. All requests for condemnation of every nature shall also be accompanied by the following:

(a) Negotiators' reports showing time and place of negotiations,

¹⁴ The acquiring agency has an affirmative responsibility with the Department of Justice to minimize costs. At any time when it appears that a deposit in a condemnation case may be inadequate, the acquiring agency should immediately communicate with the United States Attorney or other appropriate representative of the Department of Justice for prompt consideration of the advisability of making an additional deposit.

¹⁵ See fn. 10, *supra*, p. 14.

¹⁶ Suggested wording for various estates appears in appendix B, *infra*, pp. 30-44. The necessity for correct descriptions of land and accurate title data has been pointed up by the opinion in *United States v. Chatham*, 323 F.2d 95 (C.A. 4, 1963). While it is believed that the Court of Appeals went too far in reversing the judgment of the district court in the *Chatham* case, the case does serve to demonstrate the care which must be exercised by the acquiring agencies in describing the lands taken and by the Department of Justice in effecting service upon the owners of the land. See also *United States v. 355.70 Acres in Rockaway and Jefferson Townships*, 327 F.2d 630 (C.A. 3, 1964), where the United States was charged with interest on funds deposited because the parcel descriptions used prevented allocation of the deposit amongst the parcels.

lowest offer made by landowners and highest counteroffer made to landowners.¹⁷

(b) All appraisal reports, whether or not they have been approved by the agency, together with all analyses and review reports prepared by agency representatives.

(c) Title report consisting of copy of preliminary title opinion, statement as to location of title evidence, and efforts to cure title defects, if any, prior to condemnation. If condemnation is requested because of title defects the reports should contain :

1. All title evidence.
2. An analysis of the defects and the agency's opinion as to the correct resolution of unresolved title issues;
3. A list of the attempts made by the field representative to have the title defects removed by the title company;
4. The curative data which has been obtained to remedy the defects, and
5. The contracts to purchase from the apparent owners.

[NOTE.—The Attorney General will determine whether waiver of the title defects is possible before filing the action, and, if not, the case can be filed and set for early trial disposition.]

B. PROCEDURE AFTER CONDEMNATION PROCEEDINGS ARE INSTITUTED

1. Upon notification that a declaration of taking has been filed, or whenever property is otherwise acquired on behalf of the United States, it is recommended that the acquiring agency put a sign on the property stating "Property of the United States" or other language appropriate to the interest acquired.

2. Agency representatives should expeditiously order a continuation of existing title evidence to include a search of the records to a date subsequent to the date of establishment of a *lis pendens* and when received deliver it immediately to the United States Attorney; or, if preferred, instruct the title companies to deliver continuation reports to the United States Attorney and inform the United States Attorney that these instructions have been issued.

¹⁷In this connection it is suggested that, following the review of appraisals, and updating revision or supplementation as necessary, the practice should be for the acquiring agency to determine a fair offer for each property and send to each owner, through his counsel, if any, a stipulation form setting out the fair offer which he need only execute and return. Some owners will no doubt execute and return the form and the property can then be acquired by the agency through the less costly direct purchase procedures. And, even where the proposed stipulation is not executed and returned, the copy of the form, forwarded with the condemnation assembly, will show the offer made on behalf of the Government.

3. Appraisals should be updated to the date of taking.

4. Cooperation between the acquiring agency and the United States Attorney should continue after referral for condemnation.

a. After condemnation proceedings are instituted, the Department of Justice is charged with the successful completion of the acquisition. However, agency representatives should offer their assistance to the United States Attorney in connection with continued negotiations under his supervision. Where possible, the negotiation experience of acquiring agencies should be utilized.

b. Agency representatives should be available at pretrial and trial, and wherever practicable have the authority to give "on the spot" approval to settlements within the limitations of authority delegated to them.

c. The acquiring agency should offer to assist the United States Attorney by preparing trial exhibits, by furnishing maps, aerial photographs, and exhibits for attachment to pleadings (such as descriptions of property, estates taken, etc.), and by providing witnesses to testify on factual matters involved in the trial.

d. The United States Attorney should consult with agency representatives, where possible, *prior* to requesting specific trial or pretrial settings, and always should advise them promptly of all such settings.

e. Where some, but not all, of the interests in a tract have been purchased, the agency representative should advise the United States Attorney upon referral (for condemnation of outstanding interests) of those interests which were purchased.

f. After judgments determining the compensation have been entered which involve the payment of deficiencies, the United States Attorney will immediately submit to the Land and Natural Resources Division (for transmittal to the central office of the acquiring agency) or to the authorized representative of the agency if the award is based on a settlement or within a range of testimony which permits the representative to pay the deficiency, a certified copy and the required additional copies of such judgments. The agency should arrange for the prompt payment of the deficiency.

g. Upon the receipt of a trial report involving an award which is considered to be excessive, the interested agency should promptly submit to the Department of Justice its recommendations with respect to the filing of a motion for a new trial or appeal, together with a statement of any special reasons for appeal if errors are found from an examination of the trial record.

h. While distribution of the deposit of estimated compensation or of the award is the responsibility of the court, nevertheless, it is the policy

of the Government to aid the court in this important function. Agency representatives can be of great assistance in securing curative data, obtaining releases, and other requirements of the court in order promptly to effect distribution. Accordingly, when called upon to do so, agency representatives should render every assistance necessary to make funds available to owners who are dispossessed and to close the case.

i. After the final judgment has been satisfied and the necessary data are received in the Land and Natural Resources Division, the final opinion of the Attorney General is rendered and transmitted to the interested agency, together with the final transcript of the proceedings.

C. SETTLEMENTS

1. Maximum effort should be made to settle land acquisition disputes prior to condemnation at a figure that will fairly reflect fair market value, trial costs and reasonable trial risks.

2. Unless properties are to be donated to the United States, owners should not be requested to consummate a settlement for less than the approved appraisal of the property.¹⁸

3. After condemnation proceedings are instituted, only in unusual circumstances should settlement be considered at a figure that is substantially higher than the Government's best precondemnation offer.

4. When settlement proposals are received, close cooperation between the United States Attorney and the agency representatives in the field is necessary to obtain prompt evaluation of the offer.

5. Where offers are outside the jurisdiction of field personnel and must be transmitted to the Washington office of the agency and to the Land and Natural Resources Division of the Department of Justice for action, (a) the United States Attorney should promptly be advised of the agency representative's recommendation for acceptance or rejection; (b) the United States Attorney should advise the agency field representative when the offer has been submitted to the Department of Justice and whether acceptance of the offer has been recommended; and (c) the agency representative should forthwith forward his own recommendation to his superiors, and notify the United States Attorney of his action.¹⁹

¹⁸ See Sec. 301(3), Pub. L. 91-646, approved January 2, 1971, 84 Stat. 1894, 1904.

¹⁹ For your information and guidance, there is set out in appendix A, *infra*, p. 34, a statement of the policy followed by this Department in instances where owners insist that so-called "severance damages" be fixed in a definite amount for income tax purposes in the stipulation for settlement in condemnation cases.

1.

CONDITIONS PRECEDENT IN AUTHORIZING ACT

Typical conditions precedent appearing in various authorizing statutes are cited in the text of this brochure (*supra*, page 24). In the case of monetary limitations, it is recognized that the requirement for a statement that, in the opinion of the requesting official, the acquisition will not exceed the limitation constitutes a problem for the acquiring agency. This is because the determination of just compensation is a judicial rather than a legislative function (e.g., *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893); *United States v. New River Collieries*, 262 U.S. 341, 343-344 (1923)), so that at the time of the request for condemnation the amount of the award of just compensation is not known. Where there is doubt, however, as to whether the award of just compensation will be within the prescribed limitation, no reasonable alternative exists to filing a complaint only, unaccompanied by a declaration of taking. Under such procedure the acquiring agency is able to determine what the cost would be before irrevocably committing itself to acquiring the property.

Of course, absent a statutory limitation on acquisition cost, where it is known that the United States will acquire the property regardless of the amount awarded, it is normally better to file a declaration of taking and deposit the estimated just compensation since this both fixes the date of valuation and precludes the payment of interest on the amount so deposited. E.g., *United States v. Miller*, 317 U.S. 369, 381 (1943).

The possibility that the amount of the award exceeds the funds available is among the historic situations in which condemnation actions may be discontinued and dismissed when the complaint procedure has been used. See, *Carlisle v. Cooper*, 64 Fed. 472, 473-474 (C.A. 2, 1894); *United States v. Oregon Ry. & Nav. Co.*, 16 Fed. 524, 528 (D. Ore. 1883). Use of a declaration of taking precludes such discontinuance and dismissal (except by stipulation with the former owners under 40 U.S.C. sec. 258f) since title passes to the United States upon the filing of a declaration of taking and deposit of estimated just compensation in the registry of the court. E.g., *United States v. Miller*, 317 U.S. 369, 380-381 (1943); *Catlin v. United States*, 324 U.S. 229 (1945).

The determination of when it is appropriate and desirable to file a declaration of taking and to make a deposit of the estimated just compensation is primarily for the acquiring agency to make but it is the view of this Department that where the authorization act sets an express ceiling, use of the complaint procedure is particularly appropriate. See, in this connection, S. Rept. No. 1597, 90th Cong., 2d sess. (1968), pages 5-6, where, with respect to national park authorization, the Senate Committee on Interior and Insular Affairs expressed the view "* * * declarations of taking should be the exception and no longer the rule." (*Ibid.*, p. 6). Similar views were expressed on the Senate floor. 114 Cong. Rec. (daily ed.) S12099-S12100, S12104-S12105 (Oct. 4, 1968). While the Act then being considered and passed by the Senate (Act of Oct. 18, 1968, 82 Stat. 1188) contains no such express injunction, Senator Moss of Utah stated (114 Cong. Rec. (daily ed.) S12100):²⁰

** * * it is absolutely mandatory in the view of the chairman and in my view that no declaration of taking could be entered in the acquisition of land for the Biscayne National Monument without prior consultation with the committee and authorization or acquiescence by the committee.*

In the light of such statement of understanding, where there are statutory monetary limitations and the possibility exists that the award would exceed the limitation, acquiring agencies may want to consult with the appropriate committee and obtain the authorization or acquiescence of the committee prior to requesting the filing of a declaration of taking. However, since it is an executive branch responsibility, the acquiring agency obviously can exercise administrative discretion to use declarations of taking without such authorization or acquiescence if the agency concludes that such action is within its authority and for the best interest of the Government.

It is recognized that the complaint procedure may result in higher acquisition costs because, under such procedure, just compensation is determined as of the date of trial. However, in view of the penalty provisions for making expenditures or authorizing obligations under any appropriation or fund in excess of the amount available therein, no other means of protecting officers or employees of the United States are known in the present status of the law. The remedy appears to be to urge Congress to make funds available for Federal projects at the time they are authorized so that prompt land acquisition can be achieved without a long period of possible price escalation.

²⁰ Senator Hansen of Wyoming stated the preference that the view of the committee be included in the text of the legislation (*ibid.*, p. S12104).

SETTLEMENTS

Supplementing the discussion which appears in the text (*supra*, page 29) concerning settlements, it was concluded that it would be helpful to have a statement of this Department's policy when an owner insists that "severance damages" be fixed in a definite amount for income tax purposes in the stipulation for settlement in condemnation cases. In negotiating settlements after condemnation cases have been filed, as a matter of policy this Department has in general not concerned itself with the tax incidence upon the individual landowners of settlements which are made with them. We have sought to arrive at a specified sum "inclusive of interest" without any breakdown of particular factors considered in arriving at the settlement figure. We adhere as closely as possible to the objective standard of the fair market value at the date of the taking, which the courts have long held to constitute the constitutional requirement of just compensation for the taking of private property for public use. We primarily rely upon the appraisal data reflecting the market value of the property but, as is normally the case in negotiating compromise settlements, we consider the litigative risks in the particular case, interest which would have to be paid on any deficiency over the amount deposited as estimated compensation, and the equities involved. However, as indicated, we do not concern ourselves with the tax incidence upon the individual owners, which would be a subjective standard as contrasted to the objective standard which we endeavor to follow. Where an owner has insisted upon the amount allocated to severance damages being shown and it becomes necessary to do so to effectuate an otherwise acceptable settlement, it has been our policy to agree to the severance damages being shown but not to exceed the amount determined by the Government's appraisals for that purpose.

LAND AND NATURAL RESOURCES DIVISION DIRECTIVE NO. 11-68

Re Preparation and Review of Appraisal Evidence for Trial—Condemnation Cases.

Competent appraisal evidence with respect to the fair market value of land taken for public use, as of the date of taking, is essential to the intelligent settlement or effective trial of land condemnation cases. Client agencies of this Division, having significant financial stakes in

condemnation awards and settlement agreements, and vitally interested in uniform treatment of all landowners throughout each project area and in attainment of sound compensation awards; they consequently share a common interest with us in the development and review of such appraisal evidence. They desire to use appraisers and appraisals in pre-condemnation acquisitions of land, acceptable to trial attorneys in the event condemnation is required, and thereby achieve greater uniformity in appraisal standards between those employed by agency appraisers and those required of witnesses at trial.

As a result of interagency land acquisition conferences, field investigations of United States Attorneys' offices and Division experience over the past few months, we have concluded that the interest of the Government may suffer in some districts as a result of one or more of the following conditions:

1. Appraisals secured by acquiring agencies, either by staff or contract appraisers, are inadequate for trial use or unsound on appraisal criteria. In such cases, time and expense is lost in securing re-appraisals and injustices often result to some landowners or to the Government from material changes in valuation data part way through a land acquisition program.

2. Supplemental appraisals, needed to provide competent trial evidence, cannot be secured because of changes in land characteristics during the lag period from the taking to settlement or trial.

3. Trial or settlement is approached without continued availability of such appraisal witnesses as are competent and effective for trial use.

4. Trial attorneys sometimes secure new appraisals at figures substantially above those established by agency appraisals and use the same in trial without benefit of either agency or staff appraisal review. There is no basis for assuming that the soundness of an appraisal varies directly with the valuation level or that the Government has an obligation to use its highest appraisal figure for trial or settlement, without regard to the appraisal analysis employed, merely because it was supplied under Government appraisal contract.

Client agencies of the Division have occasionally complained that: (i) accommodation appraisals are obtained in some instances by trial attorneys to support negotiated settlement figures, (ii) trial attorneys discredit agency appraisals, whether staff or contract, without any sound appraisal basis, and discard them as a matter of course when higher valuations are suggested, and (iii) the Department of Justice is not utilizing agency and Division review capabilities effectively.

To meet such objections, if they be justified, and to provide a vehicle for interchange of data between land acquisition agencies and the Department of Justice, the following appraisal policy is hereby adopted and its implementation directed by land acquisition attorneys in the United States Attorneys' offices and in this Division:

1. United States Attorneys should participate, whenever requested by client agencies, in the selection of agency appraisers and the establishment of appraisal criteria to facilitate the use of agency staff or contract appraisals at trial; such consultation should be conducted whenever practicable at the inception of each land acquisition project.

2. Promptly after any land acquisition proceeding is initiated and in all events within 3 months thereafter, the responsible attorney should review appraisals provided by the client agency, require their updating as necessary, and determine whether supplemental appraisals will be needed for trial.

3. Where supplemental appraisals are required, in such attorney's opinion, prompt arrangements should be made for any that are needed to value the property for settlement purposes under the legal criteria that control the case; and timely arrangements should be made for preparation of any supplemental appraisal that will only be required in the event of trial.

4. Whenever two or more appraisals of particular property, whether supplied by the agency or obtained by the trial attorney, have a valuation spread in excess of 10 percent of the high appraisal figure the trial attorney shall, whenever the exigencies of trial setting permit, submit such appraisals for review by the regional or central office of the acquiring agency as appropriate, together with a statement of his proposed use of such appraisals in the settlement or trial of the subject case.

5. If the acquiring agency office to which the appraisals have been submitted disapproves the valuation level of appraisals that are planned for use at trial or in connection with settlement negotiations, said appraisals and notice of disapproval shall be forwarded to the Chief of the Appraisal Section, Land and Natural Resources Division, for

- (a) appraisal review,
- (b) opinion whether either or any said appraisals is supported by sound appraisal criteria, and
- (c) recommendation whether an additional appraisal should be obtained.

6. Whenever an appraisal has been disapproved by Appraisal

Section review as above provided, the trial attorney shall not proceed to trial or settlement of the tract for which said appraisal has been made, unless:

(a) he determines, in the exercise of his best judgment, not to use the disapproved appraisal, or

(b) he secures a new appraisal of the property by an appraiser who is approved by the Chief of the Appraisal Section, uses appraisal criteria similarly approved, and substantially concurs in the valuation level of the disapproved appraisal, or

(c) he secures the authorization of the Chief of the Land Acquisition Section to proceed to trial or settlement on the basis of the disapproved appraisal.

7. Appraisers should be selected, or approved for agency use, not only with respect to their competency and effectiveness as witnesses, but also with respect to their potential longevity and availability for the period required to bring the matter to trial. Appraisers should be evaluated periodically on the basis of their litigative success or failure; and no further use should be made of those whose appraisals have been repeatedly determined to be either too liberal or too conservative.

CLYDE O. MARTZ,
Assistant Attorney General.

NOVEMBER 22, 1968

MARCH 22, 1984

Ch. 13, p. 35

Form 1

SUGGESTED WORDING FOR VARIOUS ESTATES IN LAND**a. Fee**

The fee simple title (to Tract Nos. -----, -----, and -----), subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

b. Flowage Easement (Permanent Flooding)

The perpetual right, power, privilege, and easement permanently to overflow, flood, and submerge (the land described in Schedule "A"²¹) (Tract Nos. -----, and -----) [and to maintain mosquito control] in connection with the operation and maintenance of the ----- project as authorized by the Act of Congress approved ----- together with all right, title, and interest in and to the timber, structures, and improvements situate on the land [excepting (here, or in attached list, identify those structures not designed for human habitation which, the project representative determines, may remain on the land)], and the continuing right to clear and remove any brush, debris, and natural obstructions which, in the opinion of the representative of the United States in charge, may be detrimental to the project; provided that no structures for human habitation shall be constructed or maintained on the land, and provided further that no other structures shall be constructed or maintained on the land except as may be approved in writing by said representative of the United States in charge of the project,²² reserving, however, to the landowner(s), their heirs and assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby acquired; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

²¹ In takings related to navigable waters, the lower boundary line of the metes and bounds description should be in general terms of the existing ordinary high watermark, rather than a specific contour line. This will avoid a possible hiatus between the metes and bounds description of the tract taken and the old high watermark, in the event the agency engineer's finding of the high watermark is challenged.

²² Where the flowage easement estate is to be acquired in an area where there is active oil, gas or mineral development or there is potential development in the future, the following clause will be added to the above estate: "provided further that any exploration or exploitation of oil, gas and minerals shall be subject to Federal and State laws with respect to pollution and shall not create floatable debris."

c. Flowage Easement (Occasional Flooding)

The perpetual right, power, privilege, and easement occasionally to overflow, flood, and submerge (the land described in Schedule "A"²³) (Tract Nos. -----, ----- and -----) [and to maintain mosquito control] in connection with the operation and maintenance of the ----- project as authorized by the Act of Congress approved -----, and to operate the project in such a manner as to fulfill the purposes of its construction and other purposes which may develop in the future and do not greatly vary from present purposes, together with all right, title, and interest in and to the structures and improvements now situate on the land [excepting (here, or in attached list, identify those structures not designed for human habitation which, the project representative determines, may remain on the land)]; provided that no structures for human habitation shall be constructed or maintained on the land except as may be approved in writing by said representative of the United States in charge of the project;²⁴ reserving, however, to the landowner(s), their heirs, and assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby acquired; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

d. Access Road Easement

A perpetual and assignable easement(s) and right(s)-of-way to locate, construct, operate, maintain, and repair a roadway and utility lines in, upon, over and across (the land described in Schedule "A") (Tract Nos. -----, ----- and -----), together with the right to trim, cut, fell and remove therefrom all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right(s)-of-way; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowner(s), (his/her/its/their) heirs, executors, administrators, successors (if corporate owner), and assigns the right to use the surface of such land as access to their adjoining land.

NOTE: Use of the above reservation clause may decrease severance damage substantially. However, the using agency should be formally contacted to ascertain whether the nature of the installation requires exclusive use of the access road by the Government. Transmittal letter should indicate compliance.

²³ See footnote 21 *supra*, page 38.

²⁴ See footnote 22 *supra*, page 39.

e. Borrow Easement

A perpetual and assignable right and easement to clear, borrow, excavate and remove soil, dirt, and other materials from (the land described in Schedule "A") (Tract Nos. -----, ----- and -----),²⁵ subject to existing easements for public roads and highways, public utilities, railroads and pipelines, and reserving to the owners, their heirs, and assigns all such rights and privileges in said land as may be used and enjoyed without interfering with or abridging the right and easement hereby acquired.

f. Borrow Pit and Spoil Area Easement and Right-of-Way

The temporary easement and right-of-way for a period not to exceed -----, in, over, and across (the land described in Schedule "A") (Tract Nos. -----, ----- and -----) for the purpose of removing borrow material and/or of depositing waste material thereon in connection with the construction, operation and maintenance of ----- project;²⁶ together with the right to trim, cut, fell and remove timber, underbrush and other vegetation, structures, and any other obstructions or obstacles; reserving, however, to the owners of the said land, their heirs, administrators, executors, successors, and assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby acquired; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

g. Drainage Ditch Easement

A perpetual and assignable easement and right-of-way in, over and across (the land described in Schedule "A") (Tract Nos. -----, ----- and -----), to construct, maintain, repair, operate, patrol and replace a drainage ditch, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

h. Extinguishment of Rights in Cemetery

All outstanding right, title and interest (in the land described in Schedule "A") (Tract Nos. -----, -----, and -----), subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

²⁵ The easement estate may be limited as to time, depending on project requirements.

²⁶ The easement estate may be permanent depending on project requirements.

i. Leasehold Estate for Unimproved Land ²⁷

A term for years ending June 30, 19__., extendible for yearly periods thereafter at the election of the United States until June 30, 19__., notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term hereby taken, or subsequent extensions thereof, together with the right to remove, within a reasonable time after the expiration of the term taken, or any extension thereof, any and all improvements and structures placed thereon by or for the United States, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

j. Moratorium on Outstanding Minerals.

The free and unrestricted use of (the land described in Exhibit _____) (Tract Nos. _____, _____ and _____) free and clear of all rights of ingress and egress or all use of the surface thereof for any and all purposes, including exploration or removing oil, gas and other minerals therefrom for a period of _____ years, or for such shorter period as may be determined by the Secretary of the _____; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

k. Railroad Easement

A perpetual and assignable easement and right-of-way in, on, over and across (the land described in Schedule "A") (Tract Nos. _____, _____ and _____) for the location, construction, operation, maintenance, replacement, and/or removal of a railroad and appurtenances in connection with _____ project; together with the right to trim, cut, fell and remove underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right-of-way; reserving, however, to the landowners, their heirs, executors, administrators, successors, and assigns, all right, title, interest and privileges as may be used and enjoyed without interfering with or abridging the rights thereby taken for said public uses; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

l. Road Easement

A perpetual and assignable easement and right-of-way in, on, over and across (the land described in Schedule "A") (Tract Nos. _____, _____ and _____) for the location, construction, operation, maintenance, replacement, and/or removal of roads and highways and appurtenances thereto; together with the right to trim, cut, fell and

²⁷ Because leasehold estates for improved land necessarily vary widely no attempt has been made to set out a suggested form. The estate for a leasehold term for improved lands should describe adequately the location, structures, improvements, as well as appurtenances, etc.

remove underbrush, obstructions, and other vegetation, structures, or obstacles within the limits of the right-of-way; [reserving, however, to the landowners, their heirs, executors, administrators, successors, and assigns, all right, title, interest, and privileges as may be used and enjoyed without interfering with or abridging the rights hereby acquired by the Government;] ²⁸ the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

m. Temporary Easement for Exploratory Purpose

An easement in, across, and over certain land designated and described as Tract No. _____ for a period of _____ months beginning (date) (or with the date of possession under this proceeding), the estate consisting of the right of the Government, its representatives, agents, and contractors to survey, appraise, conduct test borings, and conduct other exploratory work necessary to the design of a public works project, subject to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs, executors, administrators, successors, and assigns all right, title, interest and privilege as may be used and enjoyed without interfering with or abridging the rights being acquired.

n. Utilities and/or Drainage Easements

A perpetual and assignable easement(s) and right(s)-of-way to locate, construct, operate, maintain, repair, patrol and remove utilities (specifically name them) and/or drainage easements (specifically name them) in, upon, over and across (the land described in Schedule "A") (Tract Nos. _____, _____ and _____), together with the right to trim, cut fell and remove therefrom all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right(s)-of-way; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowner(s), (his/her/its/their) heirs, executors, administrators, successors (if corporate owner), and assigns all right, title, interest and privilege as may be exercised and enjoyed without interference with or abridgement of the easement(s) and right(s) hereby taken for said public uses.

²⁸ The bracketed clause may be eliminated where advisable.

Form 2

OFFER TO SELL REAL PROPERTY*Project**Tract No.**Contract No.*

The undersigned, hereinafter called the Vendor, in consideration of the mutual covenants and agreements herein set forth, offers to sell and convey to the United States of America and its assigns, the fee simple title to the following described land, with the building and improvements thereon, and all rights, hereditaments, easements, and appurtenances thereunto belonging, located in the County of _____, State of _____, bounded and described as follows:

 subject to the following rights outstanding in third parties:

Excepting and reserving only the following rights and interests in the above described property: [namely:]

 The terms and conditions of this offer are as follows:

(1) The Vendor agrees that this offer may be accepted by the United States through any duly authorized representative, by delivering, mailing, or telegraphing a notice of acceptance to the Vendor at the address stated below, at any time within _____ () month(s) from the date hereof, whereupon this offer and the acceptance thereof become a binding contract.

(2) The United States of America agrees to pay to the Vendor for said land the sum of _____ (\$_____), payable on the acceptance of this offer and approval of the Vendor's title, provided the Vendor can execute and deliver a good and sufficient general warranty deed conveying said land with the hereditaments and appurtenances thereunto belonging to the United States of America and its assigns, in fee simple, free and clear from all liens and encumbrances, except those specifically excepted or reserved above, together with all right, title, and interest of the Vendor in and to any streams, alleys, roads, streets, ways, strips, gores, or railroad rights-of-way abutting or adjoining said land.

(3) It is agreed that the United States will defray the expenses incident to the preparation and recordation of the deed to the United States and the procurement of the necessary title evidence.

(4) The Vendor agrees that all taxes, assessments, and encumbrances which are a lien against the land at the time of conveyance to the United States shall be satisfied of record by the Vendor at or before the transfer of title and, if the Vendor fails to do so, the United States may pay any taxes, assessments, and encumbrances which are a lien against the land; that the amount of any such payments by the United States shall be deducted from the purchase price of the land; that the Vendor will, at the request of the United States and without prior payment or tender of the purchase price, execute and deliver the general warranty deed to the United States, pay the documentary revenue stamp tax, and obtain and record such other curative evidence of title as may be required by the United States.

(5) The Vendor agrees that loss or damage to the property by fire or acts of God shall be at the risk of the Vendor until the title to the land and deed to the United States have been accepted by the United States through its duly authorized representative or until the right of occupancy and use of the land, as hereinbelow provided for, has been exercised by the United States; and, in the event that such loss or damage occurs, the United States may, without liability, refuse to accept conveyance of the title or it may elect to accept conveyance of title to such property, in which case there shall be an equitable adjustment of the purchase price.

(6) The Vendor agrees that the United States may acquire title to said land by condemnation or other judicial proceedings, in which event the Vendor agrees to cooperate with the United States in the prosecution of such proceedings; agrees that the consideration hereinabove stated shall be the full amount of the award of just compensation, inclusive of interest, for the taking of said land; agrees that any and all awards of just compensation that may be made in the proceeding to any defendant shall be payable and deductible from the said amount; and agrees that the said consideration shall be in full satisfaction of any and all claims of the Vendor for the payment of the right of occupancy and use hereinafter provided for in paragraph 7.

(7) As additional consideration for the payment of the purchase price hereinabove set forth, the Vendor hereby grants to the United States the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the United States of this offer until such time as said land is conveyed to the United States and, upon demand, the Vendor will immediately vacate the property and deliver possession to the United States.

(8) It is agreed that the spouse, if any, of the Vendor, by signing below, agrees to join in any deed to the United States and to execute any instrument deemed necessary to convey to the United States any separate or community estate or interest in the subject property and to

relinquish and release any dower, curtesy, homestead, or other rights or interests of such spouse therein.

(9) The Vendor represents and it is a condition of acceptance of this offer that no member of or delegate to Congress, or resident commissioner, shall be admitted to or share any part of this agreement, or to any benefits that may arise therefrom; but this provision shall not be construed to extend to any agreement if made with a corporation for its general benefit.

(10) The terms and conditions aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the Vendor.

(11) All terms and conditions with respect to this offer are expressly contained herein and the Vendor agrees that no representative or agent of the United States has made any representation or promise with respect to this offer not expressly contained herein.

Signed, Sealed, and Delivered this _____ day of _____, 19__
Witnesses.²⁹

----- (Seal)
Vendor

----- (Seal)
Spouse of Vendor

----- (Seal)
Vendor

----- (Seal)
Spouse of Vendor

Notice of acceptance of this offer is to be sent to:

(Name and Address)

Acceptance of Offer to Sell Real Property

Date:

The offer of the Vendor contained herein is hereby accepted for and on behalf of the United States of America.

(Name and Title)

Witness: ²⁹-----

²⁹ These spaces will be used for witnesses signatures if required by State law.

Form 3
OFFER TO SELL EASEMENT

Project

Tract No.

Contract No.

The undersigned, hereinafter called the Vendor, in consideration of the mutual covenants and agreements herein set forth, offers to sell and convey to the United States of America and its assigns, a permanent and assignable easement for the purpose set forth in Exhibit B, in, upon, over, and across that certain tract of land described in Exhibit A, hereto attached and made part hereof.

The terms and conditions of this offer are as follows:

(1) The Vendor hereby agrees that this offer may be accepted by the United States, through any duly authorized representative, by delivering, mailing, or telegraphing a notice of acceptance to the Vendor at the address stated below, at any time within ----- () month(s) from the date hereof, whereupon this offer and the acceptance thereof become a binding contract.

(2) The United States agrees to pay to the Vendor for said easement and rights the sum of ----- (\$ -----), payable upon acceptance of this offer and approval of the Vendor's title; provided the Vendor can execute and deliver a good and sufficient general warranty deed conveying said easement and rights to the United States of America and its assigns, free and clear from all liens, encumbrances, said conveyance to be subject only to the existing easements and rights set forth in said Exhibit B.

(3) The Vendor agrees to satisfy of record, at or before conveying said easement and rights, such taxes, assessments, and encumbrances which are a lien against the land, as the United State may require, and, if the Vendor fails to do so, the United States may pay any taxes, assessments, and encumbrances which are a lien against the land; that the amount of any such payments by the United States shall be deducted from the purchase price of the easement; that the Vendor will, at the request of the United States and without prior payment or tender of the purchase price, execute and deliver the general warranty deed to the United States conveying the easement and rights herein described, pay the documentary revenue stamp tax, and obtain and record such other curative evidence of title as may be required by the United States.

(4) It is agreed that the United States will defray the expenses incident to the preparation and recordation of the deed to the United States and the procurement of the necessary title evidence.

(5) The Vendor agrees that the United States may acquire title to said easement and rights by condemnation or other judicial proceedings, in which event the Vendor agrees to cooperate with the United States in the prosecution of such proceedings; agrees that the consideration hereinabove stated shall be the full amount of just compensation, inclusive of interest, for the taking of said easement and rights; agrees that any and all awards of just compensation that may be made in the proceeding to any defendant shall be payable and deductible from the said amount; and agrees that the said consideration shall also be in full satisfaction of any and all claims of the Vendor for the payment of the right of occupancy and use hereinafter provided for in paragraph (6).

(6) As additional consideration for the payment of the purchase price hereinabove set forth, the Vendor hereby grants to the United States the right of immediate occupancy and use of the land in which said easement is to be granted for the purpose of exercising any of the rights described in said Exhibit B from and after acceptance by the United States of this offer until such time as said easement is conveyed to the United States.

(7) The spouse, if any, of the Vendor, by signing below, agrees to join in and execute the deed to the United States.

(8) The Vendor represents and it is a condition of acceptance of this offer that no member of or delegate to Congress, or resident commissioner, shall be admitted to or share any part of this agreement, or to any benefits that may arise therefrom; but this provision shall not be construed to extend to any contract if made with a corporation for its general benefit.

(9) The terms and conditions aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the Vendor.

(10) All terms and conditions with respect to this offer are expressly contained herein and the Vendor agrees that no representative or agent of the United States has made any representation or promise with respect to this offer not expressly contained herein.

Signed, sealed, and delivered this _____ day of _____, 19____

Witnesses:

----- (Seal)

(Vendor)

----- (Seal)

(Spouse of Vendor)

----- (Seal)

(Vendor)

----- (Seal)

(Spouse of Vendor)

Notice of acceptance of this offer is to be sent to:

(Name and address)

Acceptance of Offer to Sell Easement

Date:

The offer of the Vendor contained herein is hereby accepted for and on behalf of the United States of America.

Witness:

Contracting Officer

Exhibit "A"

Description of Tract No.

Exhibit "B"

Estate and rights to be conveyed to the United States of America and its assigns [Describe appropriate estate].

Form 4

CERTIFICATE OF INSPECTION AND POSSESSION ³⁰

I, -----, a ----- of the Department of -----, hereby certify that on the ----- day of -----, 19-----, I made a personal examination and inspection of that certain tract or parcel of land situated in the County of -----, State of -----, designated as Tract No. -----, and containing ----- acres, (proposed to be) acquired by the United States of America in connection with the ----- project, (from -----) in the condemnation proceeding entitled ----- Civil No. -----.

1. That I am fully informed as to the boundaries, lines and corners of said tract; that I found no evidence of any work or labor having been performed or any materials having been furnished in connection with the making of any repairs or improvements on said land; and that I made careful inquiry of the above-named vendor (and of the occupants of said land) and ascertained that nothing had been done on or about said premises within the past ----- months that would

³⁰ To be prepared at or near taking date.

entitle any person to a lien upon said premises for work or labor performed or materials furnished.

2. That I also made inquiry of the above-named vendor (and of all occupants of said land) as to his (their) rights of possession and the rights of possession of any person or persons known to him (them), and neither found any evidence nor obtained any information showing or tending to show that any person had any rights of possession or other interest in said premises adverse to the rights of the above-named vendor or the United States of America.

3. That I was informed by the above-named vendor (and by all other occupants) that to the best of his (their) knowledge and belief there is no outstanding unrecorded deed, mortgage, lease, contract, or other instrument adversely affecting the title to said premises.

4. That to the best of my knowledge and belief after actual and diligent inquiry and physical inspection of said premises there is no evidence whatever of any vested or accrued water rights for mining, agricultural, and manufacturing, or other purpose; nor any ditches or canals constructed by or being used thereon under authority of the United States, nor any exploration or operations whatever for the development of coal, oil, gas, or other minerals on said lands; and that there are no possessory rights now in existence owned or being actively exercised by any third party under any reservation contained in any patent or patents heretofore issued by the United States for said land.

5. That to the best of my knowledge and belief based upon actual and diligent inquiry made there is no outstanding right whatsoever in any person to the possession of said premises nor any outstanding right, title, interest, lien, or estate, existing or being asserted in or to said premises except such as are disclosed and evidenced by the public records.

6. That said premises are now wholly unoccupied and vacant except for the occupancy of the following, from whom disclaimer (s) of all right, title and interest in and to said premises, executed on the ____ day of _____, 19__-, has (have) been obtained :

Name _____, Address _____, Statement of Interest Claimed _____

Dated this _____ day of _____, 19__-

Approved :

(Name)

(Title)

Form 5

DISCLAIMER

State of _____, }
County of _____, } ss.

We (I) _____ (wife) (husband), being first duly sworn, depose and say (deposes and says) that we are (I am) occupying all (a part) of the land (proposed to be) acquired by the United States of America from _____, described as _____ acres, Tract No. _____, lying in _____ County, State of _____, and do hereby aver that we are (I am) occupying said land as the tenants (tenant) of _____; that we (I) claim no right, title, lien or interest in and to the above-described premises or any part thereof by reason of said tenancy or otherwise and will vacate said premises upon demand for the possession of said lands by the United States of America.

We (I) further agree that this disclaimer may be presented to any court having jurisdiction over condemnation proceedings relating to the above-described property, and such court is authorized to enter an order dismissing the undersigned from said cause without compensation and without adjudication of costs against the undersigned.

Dated this _____ day of _____, 19____

(Tenant)

(Spouse)

Witnesses:

(Superseded)

Form 6

CLOSING STATEMENT

Seller.....	Date of closing.....	19..
.....	Address or description of property:	
Sale price.....	.....
Address.....	.....
City.....	State.....	County..... State.....
Sale price.....	*****	.....
.....	*****
.....	*****
Payment in full of principal of existing first mortgage } To.....	\$.....	*****
Interest thereon from..... to.....	.....	*****
Payment in full of principal of existing second mort- } gage.....	.....	*****
To.....	.....	*****
Interest thereon from..... to.....	.....	*****
Payment of other liens to.....	.....	*****
.....	*****
Delinquent taxes for year.....	paid to County	.....
Treasurer.....	.....	*****
Taxes.....	.....	*****
Recording fees.....	.....	*****
Revenue stamps.....	.....	*****
Real estate sale commission	.....	*****
.....	*****
.....	*****
.....	*****
.....	*****
Balance due seller.....	.....	*****
Balance due United States of America.....	.....	*****
Total.....	\$.....	\$.....

The above is a complete, true and correct account of funds received and disbursed by me in closing the sale of property described at the head of this Statement.

(Closing attorney)

I/We have examined the above Statement and find it correct. This acknowledges that \$..... has been disbursed as above with my/our approval and for my/our account and benefit, which said sum is the sale price set forth in my/our Option Agreement with the United States of America, and I/we acknowledge receipt of the balance due me/us as shown above.

Form 7

In the United States District Court for the Southern District of
Indiana at Evansville

Declaration of Taking

Civil Action No. -----

UNITED STATES OF AMERICA, PLAINTIFF

v.

125.48 ACRES OF LAND, MORE OR LESS, SITUATE IN PERRY COUNTY,
STATE OF INDIANA, AND CHARLES E. ALLEN, ET AL., DEFENDANTS

To the Honorable, the United States District Court:

I, -----, Secretary of the Army of the United States,
do hereby declare that:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591), which act authorizes the acquisition of land for river and harbor purposes; the Act of Congress approved March 3, 1909 (Pub. L. 317, 60th Congress, 2d Session), which act authorizes the reconstruction and modification of existing river and harbor improvements; and the Act of Congress approved October 24, 1962 (Pub. L. 87-880), which act appropriated funds for such purposes.

(b) The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for the improvement of rivers and harbors and for other uses incident thereto. The said land has been selected by me for acquisition by the United States for use in connection with the construction of Cannelton Locks and Dam, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same land described in the complaint in the above-entitled cause.

3. The estate taken for said public use is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

4. A plan showing the land taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land,

with all buildings and improvements thereon and all appurtenances thereto and including any and all interests hereby taken in said land, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the registry of the said court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

In witness whereof, the United States of America, by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said _____, Secretary of the Army, this _____ day of _____ A.D. 19____, in the City of Washington, District of Columbia.

Secretary of the Army.

SCHEDULE "A"

The land which is the subject matter of this proceeding aggregates 125.48 acres of land, more or less, situate and being in Perry County, State of Indiana. A description of the lands taken, together with the names and addresses of purported owners thereof, and a statement of the sum estimated to be just compensation therefor, are as follows:

Tract No. 111

Situate in the State of Indiana, County of Perry, T 7 S, R 3 W, Sections 13 and 14, on the right bank of the Ohio River (720.5 mile), more particularly described as follows:

Beginning at a point in the center of Indiana State Highway No. 66, said point being common to the lands now (or formerly) owned by Tony Paulin, et ux, and the subject owner and being referenced Southwestwardly 225 feet, more or less, along the center line of said Highway from its intersection with the East-West Half Section line of Section 14; thence with the center line of said Highway as it meanders

Northeastwardly 2,420 feet, more or less, to a point in the downstream property line of Conalee Van Hoosier Dauby; thence with the said Dauby's line

S 26° 10' E 470 feet, more or less, to a point in the low water mark of the Ohio River; thence downstream with the said low water mark as it meanders

Southwestwardly 2,320 feet, more or less, to a point in the upstream property line of Tony Paulin, et ux; thence with the said Paulin's line

N. 38° 40' W 230 feet, more or less, to the point of beginning, containing 10.00 acres, more or less.

The above described land is the same land as that described in a deed from Conalee Dauby and August Dauby, her husband, to Charles E. Allen and Marie H. Allen, husband and wife, dated 28 June 1955, recorded in Deed Book 57, Page 415, in the records of Perry County, Cannelton, Indiana.

Name and address of purported owner :

Charles E. Allen and Maria Allen, his wife
Route 1, Box 100
Cannelton, Indiana

Name and address of additional parties having or claiming an interest in the land :

American Cannel Coal Company, Inc.

Address Unknown

(Coal and mineral interest recorded in Deed Book 59, Page 304 of Deed Records of Perry County, Indiana)

John Sargent

Address Unknown

(Mineral interest recorded in Deed Book 59, Page 304 of Deed Records of Perry County, Indiana).

Nelda Kelly

Address Unknown

($\frac{1}{64}$ interest in gross income from minerals recorded Miscellaneous Record "U" Page 530 of Miscellaneous Records of Perry County, Indiana.)

Estimated compensation : \$2,250.00

SCHEDULE "B"

[Map]

DEPARTMENT OF JUSTICE
LAND AND NATURAL RESOURCES DIVISION
APPRAISAL ANALYSIS

(For Use by Attorneys and Appraisers)

Analyzed by: _____ Date: _____
Name of Acquiring Agency: _____
Identification of Property (Civil No., Tract No., etc.) _____

REPORTED VALUES Appraiser	Before Value	After Value	Compensation		
			Take	Damages	Total
(1)----- Land	-----	-----	-----	-----	-----
Imp.	-----	-----	-----	-----	-----
Total	-----	-----	-----	-----	-----
(2)----- Land	-----	-----	-----	-----	-----
Imp.	-----	-----	-----	-----	-----
Total	-----	-----	-----	-----	-----
(3)----- Land	-----	-----	-----	-----	-----
Imp.	-----	-----	-----	-----	-----
Total	-----	-----	-----	-----	-----

INSTRUCTIONS: Items not applicable, indicate by N/A in appropriate blanks. Check (✓) if answer is affirmative; write (No) if answer is negative. Use reverse side to explain all items marked (No) as necessary.

A. CAPTION (Compare with Declaration of Taking or Complaint)

	Appr. (1)	Appr. (2)	Appr. (3)
a. Project and Parcel No.	Correct?	-----	-----
b. Owner's Name	Correct?	-----	-----
c. Legal Description	Correct?	-----	-----
d. Total Area of Property	Correct?	-----	-----
e. Area Acquired	Correct?	-----	-----
f. Area of Remainder	Correct?	-----	-----

B. EFFECTIVE DATE OF APPRAISAL

a. Coincides with D. of T.	Yes?	-----	-----
b. Does not coincide with D. of T. but is satisfactory	Yes?	-----	-----

C. PURPOSE OF THE APPRAISAL

a. Definition of value compatible with Federal law	Yes?	-----	-----
b. Estate appraised correct	Yes?	-----	-----
c. Taking accurately defined	Yes?	-----	-----

		Appr.	Appr.	Appr.
		(1)	(2)	(3)
D. <i>PREMISE OF THE APPRAISAL</i>				
a. Develops the applicable appraisal techniques	Yes?	-----	-----	-----
b. Follows the applicable legal rules	Yes?	-----	-----	-----
E. <i>METHOD OF APPRAISAL</i>				
a. Appraisal method and technique compatible with appraisal's				
(a) purpose	Yes?	-----	-----	-----
(b) premise	Yes?	-----	-----	-----
b. Before and after approach in partial taking supported	Yes?	-----	-----	-----
c. Omission of one or more value approaches justified	Yes?	-----	-----	-----
d. Were improvements and interests (mineral, gas, etc.) evaluated based on their contribution to the whole	Yes?	-----	-----	-----
e. Salvage value of improvements and growing crop values considered	Yes?	-----	-----	-----
F. <i>PROPERTY DESCRIPTION</i>				
a. Land description—including soil types, topography, etc.	Yes?	-----	-----	-----
b. Improvements—identified, located and described	Yes?	-----	-----	-----
c. Minerals, gas, oil, timber and growing crops identified	Yes?	-----	-----	-----
d. Description of property before and after taking	Yes?	-----	-----	-----
G. <i>HIGHEST AND BEST USE</i>				
a. Set forth and justified	Yes?	-----	-----	-----
b. Alternatives discussed	Yes?	-----	-----	-----
c. Highest and best use after the taking set forth and justified	Yes?	-----	-----	-----
H. <i>MARKET DATA</i>				
a. Prior sale of subject property considered	Yes?	-----	-----	-----
b. Cost data justified and supported	Yes?	-----	-----	-----
c. Depreciation, including physical, functional and economic obsolescence defined, analyzed and supported	Yes?	-----	-----	-----
d. Income, expense and capitalization rates analyzed and supported	Yes?	-----	-----	-----
e. Capitalization technique analyzed and supported	Yes?	-----	-----	-----
f. Comparable sales verified, described, analyzed and related to subject property	Yes?	-----	-----	-----
g. All sales reported whether or not comparable	Yes?	-----	-----	-----
I. <i>DAMAGES AND OFFSETTING BENEFITS</i>				
a. Appropriately outlined and discussed	Yes?	-----	-----	-----
b. Adequately analyzed and supported	Yes?	-----	-----	-----
c. According to Federal law	Yes?	-----	-----	-----

		Appr. (1)	Appr. (2)	Appr. (3)
J. CORRELATION AND CONCLUSION				
a. Appropriate discussion	Yes?	-----	-----	-----
b. Conclusion sound and convincing	Yes?	-----	-----	-----
c. Mathematical computations are correct	Yes?	-----	-----	-----
K. CERTIFICATION				
a. Standard clauses included	Yes?	-----	-----	-----
b. Effective date of valuation established	Yes?	-----	-----	-----
c. Appraised values set forth	Yes?	-----	-----	-----
d. Signed	Yes?	-----	-----	-----
L. EXHIBITS				
a. Appropriate pictures	Yes?	-----	-----	-----
b. Date of pictures established	Yes?	-----	-----	-----
c. Map showing subject and comparables	Yes?	-----	-----	-----
d. Plat plan, survey and map of area	Yes?	-----	-----	-----
M. QUALIFICATIONS OF APPRAISER				
a. In report	Yes?	-----	-----	-----
b. Well qualified	Yes?	-----	-----	-----
N. GENERAL				
a. Would appraiser be used as witness	Yes?	-----	-----	-----
b. Does Government have other appraisals; if (Yes) explain	Yes?	-----	-----	-----
c. Are additional appraisals warranted; if (Yes) explain	Yes?	-----	-----	-----

UNITED STATES ATTORNEYS' MANUAL
TITLE 5--LAND AND NATURAL RESOURCES DIVISION

DETAILED
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FOR CHAPTER 14

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1984 USAM (superseded)

FOREWORD

These uniform appraisal standards represent one step—a long one—among several steps which have been taken looking toward increased uniformity, fairness and efficiency in the acquisition of real property by Federal agencies.

Perhaps the first such step was the issuance of the pamphlet entitled *A Procedural Guide for the Acquisition of Real Property by Governmental Agencies*. The issuance of that publication was in furtherance of a strong belief that Federal land acquisition should be a model of fairness and efficiency. That same belief led to the second major step which was the establishment of the Interagency Land Acquisition Conference, under whose auspices these uniform appraisal standards are published.

These uniform appraisal standards stand as a good illustration of interagency coordination. They are the result of the work of the Interagency Land Acquisition Conference's Committee on Uniform Appraisal Standards. That Committee had as members representatives of Federal agencies, as follows:

Harold S. Harrison, Department of Justice, Chairman

Robert H. Alsover, Department of Justice

Harold Gold, Department of the Navy with Abner Frank as alternate

Samuel Hanenberg, Department of the Air Force with Grant Reynolds as alternate

James McCormack, Department of Housing and Urban Development

George Miron, Department of the Interior

While the Committee's own experience and knowledge in the valuation of real property was extensive, the Committee consulted with many experts in the appraisal of real property in the course of the preparation of these standards. Following the preparation of a draft by the Committee chairman and revision in the light of suggestions by Committee members, comments and suggestions were sought from the American Institute of Real Estate Appraisers, the American Society of Appraisers, the American Society of Farm

Managers and Rural Appraisers, the Society of Real Estate Appraisers, and from the chief appraisers of the major Federal land acquiring agencies. Helpful comments and suggestions were received from these sources. A revised draft was then prepared and submitted to the designated representatives of the various departments and agencies on the Interagency Land Acquisition Conference. It was only following the receipt of comments and suggestions from those representatives that the uniform appraisal standards were put into final form and presented to the Interagency Land Acquisition Conference by its Committee on Uniform Appraisal Standards with a recommendation that the standards be approved and that all member departments and agencies be urged to adopt them. The composite experience represented in the final product should assure its helpfulness in accomplishing the goals of increased uniformity, fairness, and efficiency in the acquisition of real property by Federal agencies.

This is a revision of the Uniform Appraisal Standards for Federal Land Acquisitions issued in February 1972.

WALLACE H. JOHNSON,
Chairman,
Interagency Land Acquisition Conference.

May 1973

**UNIFORM APPRAISAL STANDARDS
FOR
FEDERAL LAND ACQUISITIONS**

1. *Purpose.* These standards have been prepared in order to obtain uniformity among the various agencies acquiring property on behalf of the United States. It should make no difference to the landowner whose property is being acquired which agency is acquiring his land.

The appraisal of property for purposes of direct purchase or eminent domain by the United States presents unique problems not ordinarily encountered in appraising for sales, mortgage, ratemaking, insurance, and other purposes. This results naturally from the fact that the method of appraisal, the elements and factors to be considered and the weight given them, and the standards of valuation are determined to a great extent by law. Therefore, the judgment or opinion of the individual appraiser should be governed by proper legal standards. The justification of the appraisal before a jury, under vigorous cross-examination and in the face of contradictory appraisals, requires the utmost accuracy and thoroughness, and the valuation of the property by appropriate methods.

The purpose of these standards is to set forth generally the principles applicable to the appraisal of property for Federal land acquisitions. The rules herein stated are subject, of course, to modification under the varying circumstances of particular cases. It is in the application of general rule that wide differences of opinion occur, many of which must be resolved in court. Whenever the property to be appraised may be involved in an eminent domain proceeding, appraisers are cautioned to confer with counsel for the acquiring agency on legal questions affecting the valuation and, if condemnation is instituted or appears necessary, with the representatives of the Department of Justice who will be charged with the responsibility of preparing the condemnation case for trial. In this manner, specific legal instructions can be given when there is doubt as to the proper method of valuation or the application of particular rules to specific states of fact.

2. *Scope.* These standards will cover basically the following areas:

- A. Standards for approaching the solution to certain recurring appraisal problems.
- B. Data documentation and appraisal reporting standards for Federal acquisitions.
- C. General standards of a miscellaneous nature.

While these standards are to encourage uniform approaches to appraisal problems and to prescribe requirements for adequate supporting data and other factual information used to develop market value estimates, the materials are not in any degree presented for the purpose of limiting the scope of appraisal investigations nor to bias the independent judgment or value estimates of appraisers employed by Federal agencies.

3. *Policy.* In acquiring real property, or any interest therein, it is the policy of the United States impartially to protect the interests of all concerned. The Constitution of the United States of America provides among other cherished safeguards " * * * nor shall private property be taken for public use, without just compensation." (Fifth Amendment.) Since public funds are involved, it is incumbent upon all who are employed to represent the public interest, and citizens generally, constantly to bear in mind that " * * * it is the duty of the State, in the conduct of the inquest by which compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it."¹

A. STANDARDS FOR APPROACHING THE SOLUTION TO CERTAIN RECURRING APPRAISAL PROBLEMS

A-1. *Federal law controls:* Since the experience of many appraisers primarily involves testifying in the state courts, with a resultant familiarity with state law, it is particularly important that appraisers bear in mind that in federal eminent domain cases in the federal courts, because the meaning of "just compensation" is a matter of fundamental constitutional interpretation, questions with respect to it are to be resolved in accordance with federal rather than state law.² Federal law differs in some important aspects from the law of some of the states. Accordingly, it is incumbent upon both the attorney and the appraiser to make certain that the appraiser understands the applicable federal law wherever it affects the appraisal process

¹ *Searl v. School District, Lake County*, 133 U.S. 553, 562 (1890); *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

² *United States v. Miller*, 317 U.S. 369, 380 (1943).

in the determination of the just compensation to be paid for property acquired by the United States for public purposes.

While formerly state law controlled procedural matters, since Rule 71A, Federal Rules of Civil Procedure, which establishes the procedure to be followed in federal eminent domain actions, superseded 40 U.S.C. sec. 258, procedural as well as substantive matters in federal condemnation cases are controlled by federal law.³

State law is sometimes referred to, though not necessarily followed, in resolving the nature of the property rights acquired. Thus the Supreme Court of the United States has stated "Though the meaning of 'property' * * * in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law."⁴ It has been judicially made clear that "This does not mean, however, that every local idiosyncrasy or artificiality in a state's concepts, or the incidents thereof, necessarily will be accepted. * * *."⁵ It is also established that the United States may elect to condemn whatever interest it deems necessary whether or not the state recognizes the definition of the interest selected.⁶

A-2. *Fair market value criterion:* Under established law the criterion for just compensation is the fair market value of the property at the time of the taking.⁷ "Fair market value" is defined as the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy. In ascertaining that figure, consideration should be given to all matters that might be brought forward and reasonably be given substantial weight in bargaining by persons of ordinary prudence, but no consideration

³ *United States v. 93,970 Acres*, 360 U.S. 328, 333, fn. 7 (1959).

⁴ *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 279 (1943).

⁵ *Nebraska v. United States*, 164 F. 2d 866, 868 (C.A. 8, 1947), cert. den. 334 U.S. 815.

⁶ *United States v. Certain Interests in Property in Champaign County, Ill.*, 271 F. 2d 379, 384 (C.A. 7, 1959), cert. den. 362 U.S. 974.

⁷ *United States v. Miller*, 317 U.S. 369, 373-378 (1943); *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-378 (1946). In valuing the property as of the date of taking, it is improper to do so on the assumption that the property would be off the market. *United States v. Michoud Industrial Facilities*, 322 F. 2d 698, 705, 708-709 (C.A. 5, 1963), cert. den. *sub nom. Board of Commissioners of the Port of New Orleans v. United States and Laclede Steel Co. v. United States*, 377 U.S. 916. The principle that the Government is not required to pay the enhanced price which its demand alone has created is spelled out in Section A-9, *infra*, pp. 17-18.

whatever should be given to matters not affecting market value.⁸ The cash, or on terms reasonably equivalent to cash, requirement is important and numerous courts have noted this factor.⁹

It is realized that it is difficult to pinpoint an estimated value in an exact dollar amount. And, while eminent appraisers have expressed the belief that it is more logical to speak in terms of a range of value, for practical purposes of litigation, including estimates of just compensation to be deposited in the registry of the court upon the filing of declarations of taking, a specific dollar amount is required.

In this connection, on cross-examination the appraiser should not hesitate to acknowledge that appraising is not an exact science and that reasonable men may differ somewhat in arriving at an estimate of the fair market value of the property at the time of the taking. In doing so, however, his study of the property and the market should be such that he can go on to testify, with confidence and sincerity, that, in view of his consideration of all relevant factors, the amount selected in his opinion most nearly represents the fair market value of the property—and his supporting data should be such as fully to warrant his conclusion.

This market value which is sought is not merely theoretical or hypothetical but it represents, insofar as it is possible to estimate it, the actual selling price. As has been judicially declared: "It is well recognized that where private property is taken for public use, and there is a market price prevailing at the time and place of taking, that price is just compensation."¹⁰ Thus, when standardized property for which there is a continuous market, such as the stock exchange or commodity exchanges, is involved, that market price is controlling.¹¹

It is, of course, rare that real estate parcels or tracts are sufficiently identical and are traded in large enough volume as to present such

⁸ In this connection, the Supreme Court has cautioned that " . . . strict adherence to the criterion of market value may involve elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the factfinding body in arriving at 'fair' market value." *United States v. Miller*, 317 U.S. 369, 375 (1943).

⁹ E.g., *Kerr v. South Park Commissioners*, 117 U.S. 379, 386-387 (1886); *Shoemaker v. United States*, 147 U.S. 282, 304-305 (1893); *United States v. Miller*, 317 U.S. 369, 373, 374 (1943); *United States v. Certain Parcels of Land in Philadelphia (Wainwright)*, 144 F. 2d 626, 630 (C.A. 3, 1944); *Nebraska v. United States*, 164 F. 2d 866, 868 (C.A. 8, 1947), cert. den. 334 U.S. 815.

¹⁰ *Anderson-Tully Co. v. United States*, 189 F. 2d 192, 195 (C.A. 5, 1951), cert. den. 342 U.S. 826; *United States v. New River Collieries*, 262 U.S. 341, 344 (1923).

¹¹ *Ibid.*

a market. But the measure of compensation is not changed by the lack of active trading. The objective to be reached remains the same, i.e., the price for which the tract in question would sell. The problem of proof is simply rendered more difficult. Thus,

There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is 'no market' for the property in question. But that does not put out of hand the bearing which the scattered sales may have or what an ordinary purchaser would have paid for the claimant's property. We simply must be wary that we give these sparse sales less weight than we accord 'market' price, and take into consideration those special circumstances in other sales which would not have affected our hypothetical buyer.¹²

In this connection, the Supreme Court has noted that "The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent."¹³ The Court goes on to state: "If exchanges of similar properties have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the 'market price' becomes so important a standard of reference."¹⁴ Accordingly, it is the "market price" which arises from the "haggling of the market" which is being sought. When price-controlled property is taken, the controlled price, being the only lawful market price, is the normal measure of just compensation.¹⁵

In this connection, it should be borne in mind that " * * * the Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return of his investment."¹⁶

Since fair market value is the test, no consideration should be given in the appraisal to any special value of the property to the owner not directly reflected in the market value.¹⁷ Likewise, market value is not affected by any special desirability to the owner by reason of *sentimental* attachment for, or family, historic, or other

¹² *United States v. Toronto Nav. Co.*, 338 U.S. 396, 402 (1949).

¹³ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

¹⁴ *Ibid.* at p. 6.

¹⁵ *United States v. Commodities Corp.*, 339 U.S. 121, 123 (1950).

¹⁶ *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 285 (1943).

¹⁷ *United States v. Miller*, 317 U.S. 369, 375 (1943); *United States v. 87.30 Acres of Land in Whitman and Garfield Counties, Wash.*, 430 F. 2d 1130, 1132 (C.A. 9, 1970).

association with the property.¹⁸ Historical association may be considered only when and to the extent that it affects market value.

Buildings and improvements^{18a}, timber, crops, sand, gravel, minerals, oil, and so forth, in or upon the property are to be considered to the extent that they enhance the fair market value of the property as a whole. The total value should not be estimated by adding the values of such separate items to the value of the land, and the fact that the various items are in separate ownerships does not alter the rule. It must be remembered that it is the fair market value of the entire property that is the standard of valuation, and not the total of the money values of separate items. The mere possibility of the existence of minerals, oil, or gas is not sufficient to affect market value. Such a possibility can be given consideration only when there is sufficient likelihood of the presence of mineral, oil, or gas as to effect market value and when that likelihood would be given weight by a prudent person in bargaining.

As a general rule, the property should be valued as of the time of taking, or as near that time as is possible. When the appraisal is made after the taking, no consideration whatever should be given to physical changes, particularly improvements made by the condemnor, or changes in value occurring after the taking. Likewise, as discussed in section A-9 (*infra*, pages 17-18), no consideration should be given to or allowance made for enhancement or diminution in value of the property attributable to or resulting from the governmental use or project, whether such changes in value occur before or after the time of taking. Should the landowner attempt to increase the amount of just compensation by making improvements after the institution of the proceeding, but before the actual taking, the property should be evaluated both with and without such improvements for submission to the court.

A-3. *Highest and best use*: The determination of the fair market value should include consideration of the highest and best use for

¹⁸ *United States v. Miller*, 317 U.S. 369, 375 (1943); *United States v. Smith*, 355 F. 2d 807, 810 (C.A. 5, 1966); *United States v. 711.57 Acres of Land in Eden Twp., Alameda County, Cal.*, 51 F. Supp. 30, 32 (N.D. Calif. 1943).

^{18a} Section 302(a) of P.L. 91-646, approved January 2, 1971, 84 Stat. 1894, 1905, provides:

*** notwithstanding any other provisions of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such property will be put. Appraisers should receive from the acquiring agency advice as to the requirements of such agency for the removal of buildings, structures and the identification of those which the head of the agency determines will be adversely affected by the proposed use of the property.

which the property is clearly adapted. By highest and best use is meant either some existing use on the date of taking, or one which the evidence shows was so reasonably likely in the near future that the availability of the property for that use would have affected its market price on the date of taking and would have been taken into account by a purchaser under fair market conditions.¹⁹ As has been judicially noted, "Obviously the more profitable operation must be one allowed by law to be carried out on the premises."²⁰ In no event should the appraisal be made by the evaluation of the property for one use, and the addition to that amount of the value for a different and inconsistent use. And as spelled out in more detail under the heading "Conjectural and speculative evidence" (*infra*, pp. 16-17), remote or speculative uses should not be considered. Normally, because of existing economic pressures, the existing use represents the highest and best use.

Because the highest and best use is a most important consideration, it must be dealt with specifically in appraisal reports. Many things must be considered in determining the highest and best use of the property including: supply and demand; competitive properties; use conformity; size of the land and possible economic type and size of structures or improvements which may be placed thereon; zoning; building restrictions; neighborhood or vicinity trends.

Important practical applications of highest and best use determinations arise in connection with partial takings or flowage, clearance or other types of easements. The value of the remainder, after a partial taking, is governed largely by the highest and best use of the remainder after the taking. If, for example, what was essentially farm land before the taking has become lake front property having a new and highest and best use for recreation home sites, the important principle of offsetting benefits discussed in Section A-10, *infra*, pages 18-21, would become applicable. However, if the taking causes the remainder of a single tract to have a less valuable highest and best use, then the compensation to be awarded includes diminution in value to the remainder resulting from the taking of a part of it, as discussed more fully under Section A-11, *infra*, pages 21-25.

In this connection, it is suggested that, in fairness to the condemnee, consideration should be given to any material change in the intensity of use within a highest and best use. An example of this would be where a balanced farm in the before position has been left an unbalanced farm in the after position because of the partial taking by the Government. The highest and best use category of an agricultural

¹⁹ *Olson v. United States*, 292 U.S. 246, 255 (1948).

²⁰ *United States v. Meadow Brook Club*, 259 F. 2d 41, 45 (C.A. 2, 1958), cert. den. 358 U.S. 921.

farm would cover both positions. However, the two intensities of that use, a balanced versus an unbalanced farm, would identify a change in the sales comparative rating for each position.

A-4. *Prior sales of the identical property:* Since compensation is measured by market value (*supra*, p. 3), prior sales of the same property, reasonably recent and not forced, are the best evidence of market value.²¹ Accordingly, the appraiser has an obligation to determine what the owner paid for the property. Adjustments for changes in market conditions may have to be made, or the prior sale may have been made under circumstances which render it irrelevant to a determination of the fair market value as of the date of taking, but each appraisal report should include a statement with respect to the consideration accorded to the immediate past sale of the property condemned.

Because of its pertinency, the admission of evidence of a sale of the property condemned has been sustained even though a considerable period of time elapsed between the sale and the taking.²² Too frequently it has been found that the very property being condemned was recently purchased by the condemnee at a price far under that which he is claiming but that no real effort had been made to bring out the fact of such sale. It is essential that such sales be included by the appraiser in his report and that the fact of such a sale be adduced either by way of direct testimony of the Government's witness or by way of cross-examination of the landowner's witness.

In addition to including in his appraisal report the latest sale of the property (regardless of when it was made and with whatever statement is deemed warranted concerning its relevancy to the value as of the date of taking and the adjustments, if any, made to reflect that value), all sales of the subject property within 10 years of the date of taking should be included in the reported history of the subject property.

²¹ E.g., *Baetjer v. United States*, 143 F. 2d 391, 397 (C.A. 1, 1944), cert. den. 823 U.S. 772; *United States v. Certain Parcels of Land in Philadelphia (Wainwright)*, 144 F. 2d 626, 629-630 (C.A. 3, 1944); *United States v. Bechtold Co.*, 129 F. 2d 473, 479 (C.A. 8, 1942); *Fransen v. Chicago, M. St. P. Ry. Co.*, 278 Fed. 370, 373 (C.A. 7, 1921); *Dickinson v. United States*, 154 F. 2d 642, 643 (C.A. 4, 1946); *United States v. Ham*, 187 F. 2d 265, 269-270 (C.A. 8, 1951); *Love v. United States*, 141 F. 2d 981, 983 (C.A. 8, 1944).

²² *Dickinson v. United States*, 154 F. 2d 642, 643 (C.A. 4, 1946) (sale in 1937 held properly admitted when taking was in 1943); *Love v. United States*, 141 F. 2d 981, 983 (C.A. 8, 1944) (sale in 1933 held properly admitted when taking was in 1940); *United States v. Bechtold Co.*, 129 F. 2d 473, 479 (C.A. 8, 1942) (sale in 1925 held properly admitted when taking was in 1939). In *Bechtold* the court stated (p. 479): "The fact that the purchase was made some fourteen years before the date of taking the property went to the weight of the evidence, rather than to its admissibility."

A-5. *Comparable sales approach*: In the absence of prior sales of the land taken, arm's-length transactions in lands in the vicinity of those taken at about the time of taking are the best evidence of market value.²³ Too often it has been found in appraisal reports and appraisal testimony that the comparable sales approach has been relegated to a position as simply one of various approaches to value, with more time and attention being given to other generally less reliable approaches to value.

Comparison of sales transactions to subject property being appraised is the essence of the comparative approach. The basic rating elements to be considered are recognized as:

1. Time interval between sale date and appraisal date.
2. Motivation of sale transactions.
3. Location, including proximity to roads, schools, etc.
4. Similarity of highest and best use positions, including intensity of utilization of that use.
5. Physical similarities and dissimilarities.
6. Economic similarities and dissimilarities.

The recognition that the comparative approach is normally the best evidence accepts the truism that all three of the usual approaches are based on market data interpretation. It is recognized that the cost analysis and income analysis become a part of the comparative analysis to the extent that physical and economic similarities and dissimilarities are identified through the cost and income analysis.

When there are adequate sales, however, there is little reason to dwell on other approaches to value to any great extent. As stated by the Supreme Court of the United States, "Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation."²⁴ The comparable sales approach normally should be stressed and care should be taken that it does not get lost among other evidence concerning less reliable approaches to value. Since it is the only approach to value that reflects the balance of supply and demand in actual trading in the market place, it usually develops the most acceptable and convincing evidence of the fair market value of the property.

It is imperative that sales be verified as to amounts and to ascertain whether terms and conditions of sales were conventional and under open competitive market conditions. This requires interviews and discussions with the seller, buyer, the closing agent, or the broker handling the transactions and the verification of recordation, which

²³ E.g., *Baetjer v. United States*, 143 F. 2d 391, 397 (C.A. 1, 1944), cert. den. 328 U.S. 772; *Welch v. Tennessee Valley Authority*, 108 F. 2d 95, 101 (C.A. 6, 1939), cert. den. 309 U.S. 688.

²⁴ *United States v. New River Collieries*, 262 U.S. 341, 344 (1923).

is the only avenue of verification not based upon statements of persons other than the appraiser. Distress sales, forced sales, and sales with unreasonably generous financing terms provided by the seller should generally not be used for comparative purposes.

If want of available market data necessitates reference to such a sale or sales, it is important that proper adjustments be made. Sales involving the exchange of property are generally considered unreliable for use in the comparable sales approach. Also, since sales between members of a family may involve other considerations than a fair market value consideration, such sales are not considered to be conventional market transactions and should not be used for comparative purposes. Sales of farms which include livestock, farm tools, and equipment such as tractors, trucks, etc., should likewise not be used unless the sales can be logically adjusted to reflect only the real property transaction.

It is essential to inspect the sales. Bear in mind that at times it is necessary to find what changes have been made since the purchase so that it is possible to judge the condition of the property at the time the sale was made.

The essential purpose of inspection of supporting comparable sales is to compare the property under appraisal with properties recently sold on the basis of location, improvements, topography, transportation, utilities, income, where applicable, and all matters which have an effect on market value pertaining to relative desirability. The comparison should also include any circumstances surrounding the sale as well as an adjustment for the date at which sale was made to compensate for any changes in the market that have occurred since the sale. After the property has been compared, item by item, with the property under appraisal, then it is desirable to look at the property under appraisal as a whole in comparison with the comparable sale as a whole. On this basis it is then possible to come to a sound conclusion as to how much better, or poorer, the subject property is than the comparable sale property and thereby to derive from the prices paid for the comparable sale properties an indicated sale price, or value, for the property under appraisal.

In selecting the comparable sales to be used in valuing a given property, it is fundamental that the greatest weight should be given to the properties most comparable to the property under appraisal. Comparable sales given the most weight should be comparable as to size and as to as many other features as possible in the estimation of the fair market value of the property under appraisal. Each appraisal should contain a sufficient description of the com-

parable sales used so that it is possible for the reviewer to understand the conclusions drawn by the appraiser from the comparable sales used. Photographs of the comparable sales are valuable visual aids in indicating the comparability of the property recently sold with the property under appraisal. Such photographs should accompany each appraisal report not only to aid the reviewing appraiser but for the acquiring agency's records and for later use in possible condemnation trials. In addition to the identification of the property, all photographs should show the date taken and the name and address of the person taking the photograph.

While the consideration and weight to be given sales of other lands is determined by application of the three tests of proximity in time, proximity in location and similarity, the appraiser should investigate, list in his report, and be prepared to testify with respect to all sales which might, with any stretch of the imagination, be pertinent.

When the comparability of a sale is disputed in the course of a valuation trial, it is a well-recognized principle of law that the determination of comparability rests within the sound discretion of the trier of facts, whose ruling is reviewable only for abuse of discretion.²⁵

A-6. *Cost approach*: The cost approach is generally recognized as the least reliable method of valuation.²⁶ The Courts have made clear that this approach should never be used "when no one would think of reproducing the property."²⁷

In this approach, the fair market value of the bare land is added to the depreciated reproduction or replacement cost of the improvements to arrive at an indication of the value of the property. The value of the land bare and subject to improvement is always estimated by a study of comparable sales. The estimate of the reproduction or replacement cost of the improvements is based on current cost of labor and materials for construction of improvements. From

²⁵ E.g., *United States v. 55.22 Acres of Land, Etc., Yakima County, Wash.*, 411 F. 2d 482 (C.A. 9, 1969); *United States v. Certain Land in City of Fort Worth, Texas*, 414 F. 2d 1029, 1031, (C.A. 5, 1969); *United States v. 124.84 Acres of Land, Warrick County, Ind.*, 387 F. 2d 912, 915 (C.A. 7, 1968); *United States v. 60.14 Acres of Land in Warren and McKean Counties, Pa.*, 362 F. 2d 660, 669 (C.A. 3, 1966); *United States v. Featherston*, 325 F. 2d 539, 543 (C.A. 10, 1963).

²⁶ *United States v. Certain Interests in Property in Champaign County, Ill.*, 271 F. 2d 379, 382 (C.A. 7, 1959), cert. den. 362 U.S. 974; Orgel, *Valuation Under Eminent Domain* (2d ed. 1953), p. 57 where, after a rather comprehensive discussion the author states as one of his conclusions that "structural cost should be recognized as an inferior measure of value, to be given weight only in those cases where more satisfactory evidence based on actual sales or on earning power is not available."

²⁷ *United States v. Toronto Nav. Co.*, 338 U.S. 396, 403 (1949); *United States v. Benning Housing Corp.*, 276 F. 2d 248, 253 (C.A. 5, 1960); *Buena Vista Homes, Inc. v. United States*, 281 F. 2d 476, 478 (C.A. 10, 1960).

this cost new estimate is deducted all forms of depreciation, as discussed hereinafter. The cost approach is generally considered to be the least accurate indication of value and usually develops the upper or maximum limit of value. It is most generally used as a check on the estimate of value indicated by the comparable sales approach.

In the case of special purpose properties—so-called “unique” properties—which are not generally bought and sold, it is sometimes necessary to resort to reproduction cost new less depreciation for want of any more reliable method of valuation.²⁸ It is important to bear in mind that if resort is necessary to the reproduction approach *all* forms of depreciation—physical deterioration, economic obsolescence and functional obsolescence—must be accurately reflected and deducted from the reproduction or replacement cost before the land and the buildings are added together to find the value indicated by cost approach.²⁹ Whenever the cost approach is indicated and it can be determined at what time and for how much the improvements were erected, a trending up—or down, as appropriate—of such initial costs becomes an important part of the analysis.

It should be noted that many of the reported cases speak in terms of reproduction cost new less depreciation and use the words “reproduction” and “replacement” interchangeably. The appraiser should recognize the distinction between replacement cost and reproduction cost. Replacement cost has been defined as the present cost of replacing the improvement with one having the same utility, and reproduction cost as the present cost of reproducing the improvement with one of the same or highly similar material.³⁰ Generally, the reproduction cost

²⁸ The Courts have made clear that “Even where there have been no sales of similar property in the vicinity upon which a basis of valuation might be predicated, the quest is still for ‘market value’” *Kinter v. United States*, 156 F. 2d 5, 7 (C.A. 8, 1946); *United States v. Toronto Nav. Co.*, 388 U.S. 396, 402 (1949).

²⁹ In his *Condemnation Appraiser's Handbook* (1988), George L. Schmutz points out (p. 25) that elements of depreciation other than physical “quite commonly constitutes the major part of the total depreciation found in structures.” In 2 *Orgel, Valuation under Eminent Domain* (2d ed. 1953) § 188, p. 8, it is stated that “other forms of depreciation-obsolescence, inadequate or excessive size, and other forms of inadaptability—are often more significant than mere physical deterioration.” This authority warns that “whenever reproduction cost is offered as evidence, the court should make every effort to assure a full deduction for those elusive forms of depreciation, obsolescence and inadequacy, that are so often disregarded by all but the most careful appraisers.” *Id.* at 57.

³⁰ *The Appraisal of Real Estate* (5th Edition, p. 180), published by the American Institute of Real Estate Appraisers. It is further stated therein that “*** reproduction cost is the present cost of replacing a building with as nearly an exact replica as modern materials and equipment will permit. ***. To follow the theory of replacement cost to its ultimate end, the appraiser would not necessarily have an identical appearing building at all. ***. In effect, some of the inutility present in the building would be streamlined out of the cost estimate before depreciation is taken. ***.”

approach, less physical, functional and economic depreciation, is more relevant to the property as it exists and should be utilized if the cost approach is applicable.

Caution to be exercised in considering the costs of reproduction is pointed out in *United States v. 49,375 Square Feet of Land in Borough of Manhattan*, 92 F. Supp. 384, 387-388 (S.D.N.Y. 1950), affirmed *per curiam sub. nom. United States v. Tishman Realty & Constr. Co.*, 193 F. 2d 180 (C.A. 2, 1952), cert. den. 343 U.S. 928, as follows:

A third method of appraisal is somewhat tentatively and timidly put forward by the claimant, namely, the reproduction method. Here an expert is called upon to give his version of the sound value of the building by estimating what it would cost to reproduce it, and then deducting a fair amount for depreciation. This "method" is perhaps the most excellent example conceivable to demonstrate that none of such abstractions ought to have a place in the search for market value, generally speaking. The use of that method here (and, by the way, the claimant does not contend it should be used even though it called evidence on the point) would lead to this result: a piece of property for which the claimant paid in 1945, \$2,800,000, while under the comparison method is worth some \$3,000,000, and which under the claimant's summation method would be worth roughly \$5,000,000, would cost the government \$7,753,641. But on the broader grounds, and ignoring the fact that on the figures an absurd result is reached, it is apparent that the reproduction method is in itself absurd in the ordinary case, because even in ordinary times it is ridiculous to suppose that anyone would think of reproducing this or any like property, and that same thing would be true in the vast majority of cases, I should think. [Footnote omitted.]

A-7. *Income approach*: Initially, as indicated under the discussions headed "Prior sales of the identical property" and "Comparable sales" (*supra*, pp. 8-11), it should be remembered that the use of sales normally is the most direct and accurate method of estimating value. There are, of course, some income producing, investment-type properties where the "income" (now frequently referred to as the "earnings") approach is particularly relevant. However, even when valuing that type of property, where there are a reasonable number

of sales demonstrating what buyers and sellers are actually paying in the market for comparable properties, reliance upon a valuation approach other than the comparable sales approach should be given careful consideration.

The above-cautionary note is warranted. Initially, use of the income approach frequently consumes a disproportionate amount of time, and, as a result, it receives unmerited emphasis to the detriment of the sales evidence which demonstrates what buyers and sellers are paying on the market for comparable income producing properties. Also, the myriad factors and great variables involved in the capitalization process (capitalization rates, Inwood factors, gross income, effective gross income, net income before recapture, net income after all depreciation, residual techniques, etc.) preclude it from being a readily understandable approach in any event. Each of the factors must be carefully analyzed and objectively supported to prevent the result from being utterly fanciful. It is most necessary that the capitalization rate be supported by showing of rates from comparable investments.³¹ It must be borne in mind that sometimes a change of even a fraction of a percent in the capitalization rate can make an immense change in the capitalized value. Too often appraisal witnesses select a capitalization rate "on the basis of my own judgment and experience."³² This is not substantial support for the rate used. As has been indicated, support from the market place is vital.

The most effective guide to the proper rate at which the net income should be capitalized is the ratio of net income to sale prices in similar transactions. This ratio reflects the capitalization rates resulting from negotiations between buyers and sellers in the open

³¹ *United States v. Leavell & Ponder, Inc.*, 286 F. 2d 398, 407 (C.A. 5, 1961), cert. den. 366 U.S. 944; *United States v. 158.76 Acres in Windham County, Vermont*, 298 F. 2d 559, 561 (C.A. 2, 1962); *Likins-Foster Monterey Corp. v. United States*, 308 F. 2d 595, 599 (C.A. 9, 1962).

³² In this connection attention is invited to the prologue entitled "Experience and Judgment" in *Ellwood Tables for Real Estate Appraising and Financing* (2d ed., 1967, ix), wherein it is stated:

"I believe experience can teach lessons which may lead to sound judgment. I believe sound judgment is vital in selecting the critical factors for appraisal. But, I also believe the bright 17-year-old high school student in elementary astronomy can do a better job estimating the distance to the moon than the old man of the mountains who has looked at the moon for 80 years. So, I find it difficult to accept the notion that dependable valuation of real estate is nothing more than experience and judgment.

"I would not give a red cent for an appraisal by the 'expert' who beats his breast and shouts: 'I don't have to give reasons. I've had 40 years of experience in this business. And, this property is worth so much because I say so.'

"After all, value is expressed as a number. And, no man lives who, through experience, has all numbers so filed in the convolutions of his brain that he can be relied upon to choose the right one without explicable analysis and calculation."

market. This can be ascertained only by a study of the recent sales made in the open market and the net income of the properties sold.

In considering the capitalization rate to be applied, it must be remembered that the capitalization rate applied to real estate includes a penalty for lack of liquidity, the penalty for the management of the money, the penalty for risk of regularity of net money income, the risk for the possible future loss of the capital investment, and any other such risk factors as are considered in similar market transactions. Since such penalties are properly reflected in market transactions, they are items for comparison with comparable sales.

Since the demand for a return *on* the investment, as well as a return *of* the investment, make up the rate by which income is capitalized to estimate value, there would appear to be every reason to conclude that a substantial increase or decrease in interest rates will have an effect on the market value of real estate. Although, as has been noted, many factors affect value, it is axiomatic that the larger the capitalization rate the lower the value.

As has been noted (Sec. A-2, *supra*, p. 3), the test is the fair market value in cash, or on terms reasonably equivalent. Too often overlooked is the large discount that must be applied to arrive at the present worth of money to be earned in the future. Money that is to be earned, say 12 years in the future and beyond, has surprisingly little present value.

In using the capitalization of income approach to value, care should be taken to consider only income which the property itself will produce—not income produced from a business enterprise conducted on the property. When the public requires the land upon which a business is located, the business is not taken and just compensation does not include an award for loss of the business or its profits.³³ Moreover, business income is so much the result of the skill of the person conducting it and many other factors that it has only a remote and conjectural relationship to the value of the land.³⁴ Accordingly, the rule against admitting evidence of profits or income, either past or future, from a business conducted on the prop-

³³ E.g., *United States v. Petty Motor Co.*, 327 U.S. 372, 377-378 (1946); *United States v. General Motors Co.*, 323 U.S. 373, 379-380 (1945); *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281 (1943); *Mitchell v. United States*, 267 U.S. 341, 345 (1925); *Joslin Co. v. Providence*, 262 U.S. 668, 675 (1923); *Bothwell v. United States*, 254 U.S. 231, 238 (1920); *A. G. Davis Ice Company v. United States*, 362 F. 2d 934, 936-937 (C.A. 1, 1966).

³⁴ With respect to inadmissibility of evidence of a conjectural or speculative nature see the materials under the heading "Conjectural and speculative evidence," *infra*, pp. 16-17.

erty condemned is applicable to farm lands as well as to other lands.³⁵

As pointed out in the *Lehigh Valley Coal Co.* case cited in footnote 35, *supra*, there are, of course, many elements of fact which may properly be taken into account as bearing upon the value of the land itself such as the situation of the property; the uses to which it is put; the character and extent of the business carried on, as distinguished from the profits from that business; the facilities for doing the business, and location of the property as a point commanding trade from various parts of the city, or otherwise. These may be considered but with sole reference to the market value of the land.³⁶

A-8. *Conjectural and speculative evidence*: In seeking to determine the fair market value, that is, the amount that in all probability would have been arrived at by fair negotiation between an owner willing to sell and a purchaser desiring to buy, there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. However, in the words of the Supreme Court of the United States, "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth. * * * ." ³⁷ Sound guidance also appears in this respect in the following language by the United States Court of Appeals for the District of Columbia Circuit:

Land value quotations may be affected by many possibilities far too speculative, contingent and unformed to permit determination of judicial validity. Land values, like security values, are sensitive to mere expressions of interest in buying and selling, or even to the mere existence of an interest sufficient to

³⁵ *United States v. Ham*, 187 F. 2d 265, 271 (C.A. 8, 1951); *United States v. Meyer*, 113, F. 2d 387, 397 (C.A. 7, 1940), cert. den. 311 U.S. 706; *United States v. 26,699 Acres of Land in Long and McIntosh Counties, Ga.*, 174 F. 2d 367, 368 (C.A. 5, 1949); *Welch v. Tennessee Valley Authority*, 108 F. 2d 95, 100 (C.A. 6, 1939), cert. den. 309 U.S. 688; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. 415, 417 (C.C. N.D. Ill. 1886).

³⁶ The fact that Congress has seen fit to alleviate losses to businesses which, albeit not taken, must be relocated by provision for payment outside of the fair market value award determination is brought out in the discussion under the heading "Noncompensability of consequential damages," *infra*, pp. 29a-34. In view of the recent legislative developments it is particularly important, in fairness to the public treasury, that evaluators of property required for public use not include noncompensable factors in the just compensation determination.

³⁷ *Olson v. United States*, 292 U.S. 246, 257 (1934).

warrant analysis by sellers and buyers as to the possibility of zoning changes, corporate expansions, new Government programs, and the like. Where fears or hopes are based on underlying contingencies that have not developed in reasonably firm and concrete form the resulting effects on market value are insufficient to warrant judicial determination of the legality of the unformed possibility.³⁸

A-9. *Enhancement or diminution in value due to the project*: The United States cannot be charged in condemnation proceedings for values which it has created in constructing the project for which the property is taken; nor can the owner be charged for any diminution in value attributable to the project.³⁹ Accordingly, the appraisal should include no allowance for enhanced or diminished value of the property attributable to or resulting from the public use or purpose for which the land, or other land in the project, is to be acquired, or from the known intention of the Government to acquire the land or other land for the project. The Supreme Court stated in this respect (337 U.S. at pp. 333-334):⁴⁰

It is not fair that the government be required to pay the enhanced price which its demand alone has created. That enhancement reflects elements of the value that was created by the urgency of its need for the article. It does not reflect what a "willing buyer would pay in cash to a willing seller," *United States v. Miller, supra*, [317 U.S. 369], 374, in a fair market. It represents what can be exacted from the government whose demands in the emergency have created a sellers' market. In this situation, as in the case of land included in a proposed project of the government, the enhanced value reflects speculation as to what the government can be compelled to pay. That is a hold-up value, not a fair market value. That is a value which the government itself created and hence in fairness should not be required to pay.

No consideration should be given to or allowance made for the involuntary nature of the taking, the lack of desire of the owner

³⁸ *Hinton v. Udall*, 364 F. 2d 676, 681 (C.A. D.C. 1966). Other courts have made similar statements concerning this rule of exclusion from consideration of mere speculation and conjecture. E.g., *Wilson v. United States*, 350 F. 2d 901, 908-909 (C.A. 10, 1965); *United States v. Payne*, 368 F. 2d 74, 76-77 (C.A. 4, 1966).

³⁹ *Shoemaker v. United States*, 147 U.S. 282, 303-305 (1893); *United States v. Miller*, 317 U.S. 369, 376-379 (1943); *United States v. Reynolds*, 397 U.S. 14, 16-18 (1970).

⁴⁰ *United States v. Cors*, 337 U.S. 325, 333-334 (1949); *United States v. Michoud Industrial Facilities*, 322 F. 2d 698, 705, 708-709 (C.A. 5, 1963), cert. den. *sub nom. Board of Commissioners of the Port of New Orleans v. United States and Laclede Steel Co. v. United States*, 377 U.S. 916.

to part with his property, or inconvenience and possible hardship caused the owner, since all property is held subject to the right of eminent domain, which is exercised in behalf of the public interest.

Albeit a part of and not inconsistent with the exclusion of enhancement due to the Government's project, because of its importance, the rule that benefits to the remainder resulting from the project for which land is acquired for public use are to be offset against the award for the partial taking is discussed immediately hereinafter under the separate heading "Offsetting of benefits." (Section A-10, pp. 18-21).

A-10. *Offsetting of benefits*: The federal law is established that the just compensation payable by the United States for the taking of private property for public use should be reduced by benefits which are capable of present estimate and reasonable computation.⁴¹ Obviously, if, as a result of the project, the remainder of an owner's land is of greater value than the entire tract was before the taking, there is no reason in fairness for the owner to receive a windfall from the public treasury. Thus it was early judicially declared⁴²:

In considering the case the true question is whether the property was injured by the improvement. If not, then there is no damage, and can be no recovery. If there is, then the recovery must be measured by the extent of the loss. If the property is worth as much after the improvement as it was before, then there is no damage done to the property. If the benefits received from making the improvement are equal to or greater than the loss, then the property is not damaged. There can be no damage to the property without a pecuniary loss. If there is no depreciation in value there is no damage, and if no injury, then there should be no recovery. * * *

While the valuation is to be as of the date of taking, the benefit from the project must be taken into account. This is accomplished by applying the "before and after" rule, i.e., determining the market value of the entire tract at the time of the taking, excluding any enhancement or diminution from the project, and the market value of the remainder, including enhancement or diminution from the project. Sales of similar property in the area before and at the time

⁴¹ E.g., *Bauman v. Ross*, 167 U.S. 548, 570 (1897); *United States v. Miller*, 317 U.S. 369, 376 (1943); *Aaronson v. United States*, 79 F. 2d 139, 140-141 (C.A. D.C. 1935); *Dick v. United States*, 169 F. Supp. 491, 494 (C.Cls. 1959), wherein the Court concisely stated: "In arriving at just compensation there should be offset against the value of the thing taken and the damage to the remainder whatever enhancement in value may have resulted from the public work requiring the taking."

⁴² *Lehigh Valley Coal Co., v. Chicago*, 26 Fed. 415, 416 (C.C. N.D. Ill. 1886).

of the taking and after the taking (to establish the after value) will normally demonstrate whether the project has enhanced or diminished area property values and will serve to eliminate claims of speculation and conjecture.

The extent of the benefit to a tract caused by the project is a fact question and the appraiser should be prepared in this respect.⁴³

The Supreme Court has noted the importance of looking to the whole picture with respect to benefits which flow from federal projects. Thus the Court stated in this connection:⁴⁴

The far reaching benefits which respondent's land enjoys from the Government's entire program precludes a holding that her property has been taken because of the bare possibility that some future major flood might cause more water to run over her land at a greater velocity than the 1927 flood which submerged it to a depth of fifteen or twenty feet and swept it clear of buildings. Enforcement of a broad flood control program does not involve a taking merely because it will result in an increase in the volume or velocity of otherwise inevitably destructive floods, where the program measured in its entirety greatly reduces the general flood hazards, and actually is highly beneficial to a particular tract of land.

The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner. While this Court has found a taking when the Government directly subjected land to permanent intermittent floods to an owner's damage, it has never held that the Government takes an owner's land by a flood control program that does little injury in comparison with far greater benefits conferred. And here, the District Court justifiably found that the program of the 1928 Act has greatly reduced the flood menace to respondent's land by improving her protection from floods. Under these circumstances, respondent's land has not been taken within the meaning of the Fifth Amendment. [Footnote omitted.]

⁴³ *United States v. 2,477.79 Acres of Land in Bell County*, 259 F. 2d 23, 28-29 (C.A. 5, 1958).

⁴⁴ *United States v. Sponenbarger*, 308 U.S. 256, 266-267 (1939).

There are many situations in which attorneys and appraisers should immediately think in terms of offsetting benefits, e.g., where the project has caused the remainder to have lake frontage, frontage on a better road, more convenient access, a beach firmed up and made more useful, drainage improvement, irrigated land, an improved view, any upgrading of the highest and best use of the remainder such as causing formerly residential property to be a prime site for a shopping center.

Under federal law benefits *must* be considered and they are nonetheless to be offset even though the same benefits are enjoyed by other lands having the same relationship to the project.⁴⁵ An important point to bear in mind is that, unlike the law in some states which varies considerably in this respect, under federal law the amount of the benefits is set off not only against any so-called "severance damage," but against the entire award of just compensation; and the owner may be made whole pecuniarily by the increase in value of the remainder he retains after the partial taking.⁴⁶

While there are cases in which distinctions are attempted to be drawn between "general" and "special" benefits, the Department of Justice has urged in several briefs filed in federal appellate courts that the attempted distinction only obscures rather than clarifies the issue and is of little practical significance. It is pointed out in such briefs that the "before" and "after" process could automatically offset benefits whether characterized as "special" or "general" insofar as they affect market value; that the cases holding that "special" benefits may include increases common to other lands in the neighborhood seem to be approaching a rule that any benefits from the project affecting market value is special;⁴⁷ that in this view exclusion of "general benefits" would seem to be merely another way of expressing the settled rule applicable here that awards may

⁴⁵ *Aaronson v. United States*, 79 F. 2d 139, 140-141 (C.A. D.C. 1935); *United States v. River Rouge Co.*, 269 U.S. 411, 414, 415 (1926); *United States v. Fort Smith River Development Corp.*, 349 F. 2d 522, 526-527 (C.A. 8, 1965); *United States v. Oranco*, 341 F. 2d 161, 167 (C.A. 8, 1965), cert. den. 382 U.S. 815 (holding erroneous a charge to the jury that it should not consider benefits enjoyed by other tracts of land in the neighborhood); *United States v. 2,477.79 Acres of Land in Bell County*, 259 F. 2d 23, 28 (C.A. 5, 1958). In this connection, it should be noted that, as these cases make clear, under established federal law a definition of "special benefits" in an appraisal handbook which states "Those benefits which accrue directly *and solely* to the advantage of the property remaining after a partial taking" (emphasis added) is clearly erroneous. The belief has been expressed to the appraisal organization which publishes the handbook that the words "and solely" should be deleted from any future edition of its handbook or that the handbook should otherwise reflect that the definition is contrary to federal law.

⁴⁶ *Bauman v. Ross*, 167 U.S. 548, 570 (1897).

⁴⁷ Cases cited in footnote 45, *supra*, p. 20.

not be based on consideration of possibilities not shown to be reasonably probable so as to affect market value; that the offsetting of benefits to the remainder resulting from the project is an aspect of the rule prohibiting the charging of the United States with values created by its project; that no distinction is made permitting the collection of "general enhancement" while excluding "special enhancement"; and that, in logic, no such distinction should be made when the exclusion takes the form of setting off benefits to the remainder against the award otherwise payable. It is doubted that any court will reject benefits as "general" when a clear showing is made that market value of the remainder was enhanced by the project.

A-11. *So-called "severance damage"*: When the United States acquires only part of a single tract in one ownership, if the taking diminishes the value of the remainder, the owner is entitled to compensation for the losses as for a taking.⁴⁸ Although "somewhat loosely, spoken of as severance damages," it is an "element of value arising out of the relation of the part taken to the entire tract."⁴⁹ Hence it is not a departure from the market value standard of compensating only for the property taken.

With respect to what constitutes a single tract, whether lands owned by the same owner may be considered as a single tract for the purpose of allowance of severance damages is a question frequently difficult to determine. While discussed at more length hereinafter, generally, severance damages should be considered only when there exists exact identity of ownership, unity of use of the lands, and physical contiguity. By identity of ownership is meant that the title to each tract must be vested to the same extent in the same owner. The ownership is not identical when the owner has different interests in the two or more tracts, as, for example, where he owns one tract in fee simple, has a leasehold interest in another, and owns in entirety the stock of a corporation which owns another tract.

The basic rule stated above has given rise to several subsidiary rules which warrant specifically inviting the attention of appraisers to them.

Initially, it should be noted that the term "severance damage" is a misnomer. While many state constitutions differ by guaranteeing compensation when property is "damaged" as well as when it is "taken," the pertinent Federal Constitution provision is " * * * nor shall private property be taken for public use, without just com-

⁴⁸ E.g., *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *United States v. Miller*, 317 U.S. 369, 376 (1948).

⁴⁹ *United States v. Miller*, *supra*.

pensation.”⁵⁰ Under the Federal rule, compensation is paid for “takings” not “damages.” Thus in some of the states the compensation may include items which the federal rules exclude as being consequential damages.⁵¹ It is important that appraisers realize and bear in mind the difference.

A fundamental basis of a claim for so-called severance damage is a diminution in the value of the part remaining.⁵² The law is that “strict proof of the loss of market value to the remaining parcel is obligatory.”⁵³ And, as has been judicially noted: “* * * the extent to which the utility of the property has been destroyed and its market value diminished must necessarily be established by factual data having a rational foundation in support of such a claim.”⁵⁴ Accordingly, “severance damage” should never be assumed merely because there has been a partial taking. It always must be fully supported by the facts in each case. Reasonably accurate maps showing all physical conditions pertinent to the entire property before the taking and to the remainder after the taking are necessary to a determination of whether there has been, in fact, a diminution in the value of the remainder because of the taking. As has been noted (Section A-10, *supra*, pp. 18-21), the taking frequently results in an increase in the value of the remainder.

In this connection, unfortunately, appraisers too often use “severance damage” as a catchall. Where their appraisal reports have factual data supporting other conclusions, often so-called severance damages are simply stated as the appraiser’s opinion without specification as to the basis for the opinion. With reference to landowners who had failed to furnish factual data to support claimed diminution in value to the remainder, a court stated: “Not only were the opinions of their experts based largely on speculation and conjecture, but these witnesses totally disregarded available evidence of comparable sales before and after the taking of the easement.”⁵⁵

⁵⁰ Fifth Amendment, Constitution of the United States of America.

⁵¹ *Batten v. United States*, 306 F. 2d 580, 583-584 (C.A. 10, 1962). For a discussion of consequential damages, see Section A-14, *infra*, pp. 29a-31.

⁵² *Cole Investment Co. v. United States*, 258 F. 2d 203, 204-205 (C.A. 9, 1958).

⁵³ *United States v. Honolulu Plantation Co.*, 182 F. 2d 172, 179 (C.A. 9, 1950), cert. den. 340 U.S. 820.

⁵⁴ *United States v. 26.07 Acres of Land in Hempstead*, 126 F. Supp. 374, 377 (E.D.N.Y. 1954); *Westchester County Park Commission v. United States*, 143 F. 2d 688, 692 (C.A. 2, 1944), cert. den. 323 U.S. 726.

⁵⁵ *United States v. 26.07 Acres of Land in Hempstead*, 126 F. Supp. 374, 377 (E.D.N.Y. 1954). As the court there went on to state: “On the other hand, Mr. Niland, the Government’s expert made a detailed survey of sales of residential and industrial parcels in the immediate vicinity of the defendants’ properties, before and after the appropriation of the easement, which plainly indicated that there was no appreciable depreciation in the market value of similar parcels as a result of the imposition of the easement. * * * .”

As indicated by the language just quoted in the text, so-called "severance damages," as other factors in determining just compensation, must not be based upon speculation.⁵⁶ As made clear in the cited case, testimony in this respect must not be "vague and speculative in character" and testimony dealing with "possibilities more or less remote" is not properly to be considered.

The rule under discussion excludes consideration of separate tracts not taken. Thus it is well established that damages may not be awarded for injury to remaining land which, even in the same ownership, is a different tract from the land condemned.⁵⁷

Unity of use is essential to showing a unified tract.⁵⁸ Unity of use contemplates that the lands in question shall be used for the identical use, as farming, manufacturing, etc. If the uses are dissimilar, no allowance can be made for severance damages. While holding that it is not essential that parcels be contiguous, physical closeness has usually been considered, possibly because the claim of unitary use of two parcels which are not adjacent to each other often represents an attempt to recover business losses rather than depreciation of value in land.⁵⁹ Appraisers must bear in mind the distinction between a residue of a tract whose integrity is destroyed and what are merely other parcels or holdings of the same owner.⁶⁰

Unity of ownership must be shown for so-called severance damages to be awarded. Thus the Court of Appeals for the Ninth Circuit has stated: "The rule applies exclusively to condemnation of the fee simple title of a tract in one ownership. * * * ." ⁶¹ Several courts, both federal and state, have held in construing this rule that differ-

⁵⁶ *Sharpe v. United States*, 112 Fed. 898, 897 (C.A. 3, 1902), *aff'd* 191 U.S. 341.

⁵⁷ *Sharp v. United States*, 191 U.S. 341, 353-355 (1903); *United States v. Mills*, 237 F. 2d 401, 404 (C.A. 8, 1956); *United States v. Crary*, 2 F. Supp. 870, 873 (W.D. Va. 1932); *United States v. Inlots*, 26 Fed. Cas. No. 15,441a (S.D. Ohio 1873), *aff'd sub nom. Kohl v. United States*, 91 U.S. 367 (1875).

⁵⁸ E.g., *United States v. Matton*, 375 F. 2d 461, 463-464 (C.A. 4, 1967); *Winn v. United States*, 272 F. 2d 282, 286 (C.A. 9, 1959); *Cole Investment Co. v. United States*, 258 F. 2d 203, 204-205 (C.A. 9, 1958); *International Paper Co. v. United States*, 227 F. 2d 201, 205-206 (C.A. 5, 1955).

⁵⁹ For a discussion of the noncompensability of business losses see Section A-14, *infra*, pp. 29a-31.

⁶⁰ There is a good discussion in this connection in *Sharpe v. United States*, 112 Fed. 898, 896 (C.A. 3, 1902), *aff'd* 191 U.S. 341, 354 (1903).

⁶¹ *United States v. Honolulu Plantation Co.*, 182 F. 2d 172, 175-176 (C.A. 9, 1950), *cert. den.* 340 U.S. 830.

ent interests, even when held by husband and wife, brother and sister, or parent and child, do not warrant recovery of severance damages.⁶²

While depreciation to the remainder because of the use to which the United States will put the land taken may be considered,⁶³ the depreciation to the remainder because of use to which the United States will put the land taken from others or from use of land it owns cannot be considered.⁶⁴

Another precaution should be stated. It is established Federal law that if regular flights of Government aircraft over a particular person's property are so frequent and at such low altitude so as to interfere directly with the use and enjoyment of the land, substantially diminishing its value, there has been a taking of an easement for which just compensation must be paid.⁶⁵ However, there are important distinctions which must be observed. When, in the expansion of an airfield, a part of a tract is taken, the device of severance damages may not be used to recover for consequential damages caused by noise, vibration and lights which the owners of other property in the vicinity of the airfield must suffer without recompense. This is so because the severance damage rule allows only such loss in value to the remaining land as may be due as to the particular land taken. As has been noted, it does not include damages resulting from the use of adjoining lands taken from other persons.⁶⁶

The preferred way to determine compensation in partial taking cases is by the "before and after" method. Under this method, which usually is the simplest approach, just compensation is arrived at by first estimating the market value of the entire unit before the taking and then subtracting from it the market value of what remains in the owner after the taking. The difference is compensation including both value of land taken and any diminution of value in the

⁶² *United States v. 87.36 Acres of Land in Whitman and Garfield Counties, Wash.*, 430 F. 2d 1130, 1133 (C.A. 9, 1970); *Kolstad v. United States*, 262 F. 2d 839, 840-841 (C.A. 9, 1959); *State v. Superior Court for Spokane County*, 10 Wash. 2d 362, 371, 116 P. 2d 752, 756 (1941); *McIntyre v. Board of County Com'rs*, 168 Kan. 115, 118-121, 211 P. 2d 59, 63-64 (1949); *Conness v. Indiana, I. & I. R. Co.*, 193 Ill. 464, 470-471, 62 N.E. 221, 223 (1901); *Glendenning v. Stahley*, 173 Ind. 674, 683-684, 91 N.E. 234, 238 (1910); *Tillman v. Lewisburg & N.R. Co.*, 133 Tenn. 554, 182 S.W. 597 (1916); *Duggan v. State*, 214 Iowa 230, 233, 242 N.W. 98, 99 (1932).

⁶³ E.g., *Sharp v. United States*, 191 U.S. 341, 354 (1903); *United States v. Grizzard*, 219 U.S. 180, 183 (1911); *West Virginia Pulp & Paper Co. v. United States*, 200 F. 2d 100, 103-104 (C.A. 4, 1952).

⁶⁴ *Campbell v. United States*, 266 U.S. 368, 371-372 (1924); *St. Regis Paper Co. v. United States*, 313 F. 2d 45, 46 (C.A. 9, 1962); *United States v. Kooperman*, 263 F. 2d 331, 332 (C.A. 2, 1959); *Winn v. United States*, 272 F. 2d 282, 286-287 (C.A. 9, 1959).

⁶⁵ *United States v. Causby*, 328 U.S. 256 261-262 (1946).

⁶⁶ In dealing with such a case, in *Boyd v. United States*, 222 F. 2d 493, 495-496 (C.A. 8, 1955), the court explained the dividing line between the recoverable damage and that which must be ignored in the valuation process.

remainder.⁶⁷ As indicated, the result of this method is a figure which automatically includes the independent value of the part taken together with any so-called "severance damages" or benefits. This whole matter is properly simply one aspect of determining just compensation for the part taken and "severance damages," as such, should not separately be awarded.

Another approach is to find the value of the part taken on the date of taking; and to add to or subtract from that figure an allowance for diminution or enhancement in value of the remainder. This method may or may not be more complicated. It usually is more subject to error, however, and is more apt to result in duplication.⁶⁸

It should be borne in mind that there are situations in which insistence upon strict adherence to the "before and after" rule would impose costly and sometimes nearly impossible burdens upon the appraisers and the courts. Examples of such situations, in which the second method discussed above would generally be applicable, are minor easement takings (for flowage, roads, pipelines, transmission lines, etc.) from large ranches, industrial complexes, etc., where the cost of valuing the whole unit before and after the taking is simply unwarranted in view of the minor easement being acquired.

In short, where its application would be logical, practical, and capable of understanding, the "before and after" method of determining compensation in partial taking cases is preferred. Fortunately, this method is generally applicable and it is the exceptional case where the cost of valuing the whole is unreasonable.

A-12. *The unit rule*: The fair market value concept which has been adopted by the courts to determine the just compensation required by the Constitution generally requires application of the so-called "unit rule," which is another principle designed to reflect the true situation in the market. This rule has two aspects:

First, the unit rule requires valuing property initially as a whole rather than by the sum of the values of the various interests into which it may have been carved, such as lessor and lessee, life tenant and remainderman, etc. This is an application of the principle that

⁶⁷ *United States v. Grizzard*, 219 U.S. 180, 185-186 (1911); *United States v. Honolulu Plantation Co.*, 182 F. 2d 172, 175 (C.A. 9, 1950), cert. den. 340 U.S. 820.

⁶⁸ Some states use the second method because they require a separate finding of severance damage since their law permits benefits from the project to be offset only from the severance damage. As has been shown (p. 20, *supra*), this reason is not applicable in federal cases.

it is the property, not the various titles, which is being taken.⁶⁹ Under this rule, the award for the whole is later apportioned among the claimants (lessor and lessee, life tenant and remainderman, etc.) as a second phase in the proceeding.⁷⁰

Normally each parcel should be appraised separately. However, if two or more contiguous parcels are in the same identical ownership, appraisals should be made of each separately and of all as a unit. This will make the appraisal report more useful to trial counsel who frequently does not know in advance of trial what the court's rulings on various issues will be. If there are several interests or estates in the property, the property should be appraised as a whole, embracing the rights, estates and interests of all who may claim, and as if in one ownership. This is in keeping with the fact that it is the property itself—the thing—rather than the various titles to it which is being acquired.

For purposes of trial and distribution of the award, the valuation of the entirety should then be broken down into valuations of the separate estates or interests. However, the condition of the title at the time of taking should be given full consideration, and if there exist estates or interests, such as easements, servitudes, or restrictions, which result in a diminution of the fair market value of the property as a whole, due allowance should be made for such factors.⁷¹ For example, land subject to an easement for public use for highway purposes generally would have no more than nominal market value,⁷² or land subject to an easement for light and air would have no highest and best use for building purposes and therefore it would have little market value for building purposes.

A very important exception to this aspect of the rule is to be borne in mind. Where the division in ownership has produced a division in use of such character as to destroy the practical unity of the property, the interests are separately valued at the outset. Examples are where buildings are owned by a tenant who has a right and

⁶⁹ The term "in rem" is used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions, which are said to be *in personam*. Many cases are illustrative of this principle. E.g., *United States v. Dunnington*, 146 U.S. 338, 351 (1892); *Bogart v. United States*, 169 F. 2d 210, 213 (C.A. 10, 1948); *Nebraska v. United States*, 164 F. 2d 866, 868 (C.A. 8, 1947), cert. den. 334 U.S. 815; *United States v. 25,936 Acres of Land in Borough of Edgewater*, 153 F. 2d 277, 279 (C.A. 3, 1946); *Meadows v. United States*, 144 F. 2d 751, 752 (C.A. 4, 1944).

⁷⁰ *Nebraska v. United States*, 164 F. 2d 866, 868 (C.A. 8, 1947), cert. den. 334 U.S. 815; *Texas v. Harris County Houston C. N. Dist.*, 158 F. 2d 861, 865 (C.A. 5, 1946); *Silberman v. United States*, 181 F. 2d 715, 718 (C.A. 1, 1942).

⁷¹ Supporting citations and a further discussion in this respect appear, *infra*, pp. 26-27.

⁷² In this respect see Sec. A-20, *infra*, pp. 34-35.

duty to remove them at the end of his term^{72a}, or where an owner has given an easement of light and air.⁷³ The "Constitution does not require a disregard of the mode of ownership."⁷⁴ However, unit valuation is not precluded by a division in use which is due to the character of the property and is not caused by the division in ownership. Thus, unit valuation is ordinarily proper where ownership is divided between such inherently diverse interests as surface rights and timber,⁷⁵ or mineral rights,⁷⁶ but separate valuations may be necessary under special circumstances.⁷⁷

It should be noted, however, that since unity of use is one of the elements for an integrated unit, it would not necessarily follow that a contiguous body of land in the same ownership constitutes a unit for valuation if the highest and best use for various parts are different. Failure to value the property as an integrated unit should, however, always be explained and supported.

The second aspect of the unit rule is that different elements of a tract of land are not to be separately valued and added together. For example, the value of timber is not added to a value for the house and those, in turn, added to a value for the remainder of the prop-

^{72a} As to the evaluation of buildings, structures and improvements owned by lessees, Section 302(b)(1) (2) of Public Law 91-646, approved January 2, 1971, 84 Stat. 1894, 1905, provides as follows:

(b)(1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

(2) Payment under this subsection shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release the United States all his rights, title, and interest in and to such improvements. Nothing in this subsection shall be construed to deprive the tenant of any rights to reject payment under this subsection and to obtain payment for such property interest in accordance with applicable law, other than this subsection.

See *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470 (1973).

⁷³ *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910); *Southern California Fisherman's Ass'n. v. United States*, 174 F. 2d 739, 740 (C.A. 9, 1949); *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786, 789 (C.A. 4, 1945); *Messer v. United States*, 157 F. 2d 793, 795 (C.A. 5, 1946).

⁷⁴ *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

⁷⁵ *Meadows v. United States*, 144 F. 2d 751, 752 (C.A. 4, 1944).

⁷⁶ *Eagle Lake Improvement Co. v. United States*, 160 F. 2d 182, 184 (C.A. 5, 1947), cert. den. 332 U.S. 762.

⁷⁷ *United States v. Welch*, 217 U.S. 333, 339 (1910); *11,000 Acres in Smith County, Tex. v. United States*, 152 F. 2d 566, 568 (C.A. 5, 1945), cert. den. 328 U.S. 835; *United States v. Harrell*, 133 F. 2d 504, 508 (C.A. 8, 1943); *United States v. Certain Parcels of Land in Baltimore*, 55 F. Supp. 257, 262-264 (Md. 1944). Application of these concepts in doubtful cases should be discussed with the attorney handling the particular case.

erty. The property is to be valued as a whole and its constituent parts considered only in the light of how they enhance or diminish the value of the whole, with care being exercised to avoid so-called "cumulative" appraisals.⁷⁸ This is a valid procedure because it is the entire unit which is being hypothetically sold, not the separate parts individually. If the appraiser is not familiar with all the types of property involved, he should consult with experts in the particular fields to familiarize himself with their methods so that he will be fully qualified to testify himself as to all items. In order to protect the record in these cases, it is important that the Government witnesses, who discuss separate elements in the property in their analyses, always clearly state that these were considered with respect to their enhancement of the value of the whole.

A-13. *The commerce, or so-called "navigation servitude"*: Under the Commerce Clause of the Constitution of the United States,⁷⁹ there is reserved to the Federal Government very broad powers over navigation and navigable waters which appraisers must bear in mind when valuing riparian land acquired by the United States. The navigable waters are the public property of the Nation and, because of this, the great inland waterways have long been deemed national assets rather than the private property of riparian owners. In this connection, the Supreme Court has stated: "[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable."⁸⁰ Hence, as the Supreme Court has observed, "although the title to the shore and submerged soil [of navigable rivers] is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution."⁸¹

Since the special values arising from access to navigable streams are allocable to the public, and not to private interests, it has formerly been concluded that to allow recovery for those values would be to permit the private owner to receive a windfall to which he is not

⁷⁸ *Devou v. Cincinnati*, 162 Fed. 633, 634 (C.A. 6, 1908), cert. den. 212 U.S. 577; *Morton Butler Timber Co. v. United States*, 91 F. 2d 884, 890-891 (C.A. 6, 1937); *United States v. Meyer*, 113 F. 2d 387, 397 (C.A. 7, 1940), cert. den. 311 U.S. 706; *United States v. Jaramillo*, 190 F. 2d 300, 302 (C.A. 10, 1951); *United States v. Certain Parishes of Land in Rapides Parish, La.*, 149 F. 2d 81, 82 (C.A. 5, 1945); *Fain v. United States*, 145 F. 2d 956, 958 (C.A. 6, 1944); *Kinter v. United States*, 156 F. 2d 5, 7 (C.A. 3, 1946).

⁷⁹ Art. I, Sec. 8, Clause 3.

⁸⁰ *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913).

⁸¹ *Gibson v. United States*, 166 U.S. 269, 271-272 (1897). There the Supreme Court stated the principle in terms that " * * * riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard." (166 U.S. at p. 276) Later the Court noted that the damage sustained by the riparian owner results not from a taking of property, "but from the lawful exercise of a power to which that property has always been subject." *United States v. Chicago, M., St. P. and P. R. Co.*, 312 U.S. 592, 597 (1941).

entitled.⁸² Accordingly, while land strategically located on navigable bodies of water undeniably enjoys potentialities, unavailable elsewhere, which may make the property more valuable in transactions between private individuals, the condemnation of land, under the commerce servitude, riparian to a navigable stream, has not previously required the United States to pay for the value of the land attributable to the flow of the stream. Under this established principle of law, the following values were formerly held to be non-compensable when the riparian upland is acquired by the Federal Government in exercise of its power to control commerce: port site value;⁸³ power site value;⁸⁴ riparian rights of access to navigable waters;⁸⁵ and, more recently, the rule has been construed to be applicable to other factors having to do with riparian location such as irrigation, boating, fishing and hunting.⁸⁶

It should be noted that "It is commerce, and not navigation, which is the great object of constitutional care."⁸⁷ For this reason the constitutional power of the United States over its waters is not limited to control for navigation. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.⁸⁸ The Supreme Court has noted that the authority "is as broad as the needs of commerce."⁸⁹

However, attention is invited to the fact that Section 111 of the Act of December 31, 1970 (84 Stat. 1818, 1821) provides as follows:

In all cases where real property shall be taken by the United States for the public use in connection with any improvement

⁸² *United States v. Rands*, 389 U.S. 121, 126 (1967).

⁸³ *United States v. Rands*, *supra*; *United States v. 87.30 Acres of Land in Whitman and Garfield Counties, Wash.*, 480 F. 2d 1130, 1133 (C.A. 9, 1970). Indeed, in *United States v. Virginia Electric Co.*, 365 U.S. 624, 631 (1961), the Supreme Court stated: " * * * The court was clearly right in excluding all value attributable to the riparian location of the land. * * *".

⁸⁴ E.g., *United States v. Virginia Electric Co.*, 365 U.S. 624, 629 (1961); *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956).

⁸⁵ In *United States v. Commodore Park*, 324 U.S. 386, 390-391 (1945), navigable waters were filled in with material dredged from other navigable waters. In *South Carolina v. Georgia*, 93 U.S. 4, 10-11 (1876), the course of the stream was diverted. In *Gibson v. United States*, 166 U.S. 269, 271-276 (1897) and *Scranton v. Wheeler*, 179 U.S. 141, 151-153 (1900), there was impairment or destruction of access to the stream by the placement of a dike or jetty in front of the riparian owner's property. In each of these situations it was held that the riparian owner had no right of recovery as against the United States in exercising its power to control commerce.

⁸⁶ *United States v. Birnbach*, 400 F. 2d 378, 382 (C.A. 8, 1968). Under the provisions of the 1944 Flood Control Act, 33 U.S.C. Sec. 701.1, with respect to waters lying wholly or partly west of the ninety-eighth meridian, improvements for navigation or flood control are limited to such use "as does not conflict with any beneficial consumptive use, present or future, in states lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes." Accordingly, where there is doubt concerning the applicability of this Act, the appraiser should consult the attorney with whom he is working.

⁸⁷ *Scranton v. Wheeler*, 179 U.S. 141, 160 (1900).

⁸⁸ *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940).

⁸⁹ *Ibid.*

of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken. The compensation defined herein shall apply to all acquisitions of real property after the date of enactment of this Act, and to the determination of just compensation in any condemnation suit pending on the date of enactment hereof.

It is anticipated that the above-quoted provisions will be construed by the courts at an early date and it is likely that any trial court rulings will be appealed to higher courts. Pending a final determination of the effect of Section 111, or the repeal or modification thereof, it is suggested that appraisals be made on alternative bases; that is, on the basis of the law prior to the enactment of this Act and also giving consideration to the values attributable to access to and riparian location on navigable waters.

A-14. *Noncompensability of consequential damages:* The basic federal law in this respect has been stated by the Supreme Court as follows:

The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be

made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government. We are not to be taken as departing from the rule they have laid down, which we think sound. Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage. [Footnotes omitted.]⁹⁰

The Supreme Court later gave further guidance with respect to noncompensable consequential damages by stating:

Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other consequential losses are refused in condemnation proceedings. * * *⁹¹

By way of further guidance, injuries to personal property and business as a result of loss of water because of a flood control project, which cause incidental spoilage of the owner's inventory and equipment, the reduction or loss of its good will and profits, and the expenses incurred in having to readjust its manufacturing operations, have been held to be noncompensable consequential damages.⁹²

⁹⁰ *United States v. General Motors Corp.*, 323 U.S. 373, 376-380 (1945). There the Court also stated (p. 382): "Whatever of property the citizen has the government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these, whatever remedy may exist lies with Congress." As noted hereinafter (p. 31), Congress has enacted extensive remedies. As reflected in the *General Motors* case, where only a portion of a leasehold interest is condemned necessitating that the lessee move out, then back in under a responsibility to return to the leasehold at the end of the Government's use or at least be responsible for the payment of rents for the period of the lease which is not taken, certain costs are allowed which would not be permitted when the entire interest is taken. In any such factual situation, the appraiser should consult with the attorney with respect to the elements to be considered in valuing the partial leasehold.

⁹¹ *United States v. Petty Motor Co.*, 327 U.S. 372, 377-378 (1946); *United States v. Payne*, 368 F. 2d 74, 77 (C.A. 4, 1966); *United States v. 87.30 Acres of Land in Whitman and Garfield Counties, Wash.*, 430 F. 2d 1130, 1132 (C.A. 9, 1970).

⁹² *R. J. Widen Co. v. United States*, 357 F. 2d 988, 993-994 (C.Cls. 1966); *Klein v. United States*, 375 F. 2d 825, 829 (C.Cls. 1967). See discussion, *infra* p. 31, for relief now granted administratively under the Act of January 2, 1971, 84 Stat. 1894.

In the absence of a statutory mandate, the United States must pay only for what it takes, not for opportunities which the owner may lose.⁹³ The Supreme Court has repeatedly noted that "Frustration and appropriation are essentially different things."⁹⁴

It should be noted that Congress has now established "* * * a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."⁹⁵ In the cited Act of January 2, 1971, there are substantial provisions for moving and related expenses, replacement housing, and relocation assistance advisory services. The payments are to be made in accordance with administrative procedures which are being established under the provisions of the Act, which, it should be noted, expressly provides (Sec. 102(b), 84 Stat. at p. 1895) that "Nothing in this Act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to the date of enactment of this Act." Particularly in view of the substantial administrative payments now authorized, in protection of the public purse, care must be taken to preclude consideration for such factors being included in the award of just compensation. Government counsel should assure, by requested charges to juries, instructions to commissioners or otherwise, that all persons having responsibility for determining just compensation are aware of the new legislative provisions in order to obviate, insofar as possible, duplicate payments of public funds being made. Since the payments and benefits provided for in Title II of the Act are to be made administratively by the acquiring agencies, contracts or options to purchase real property shall not incorporate payments for relocation costs and related items set out therein. Appraisers shall not give consideration to or include in their appraisals any allowances for the benefits provided by Title II of the Act.

A-15. *Offers to purchase*: The law is that offers to purchase real estate are in general inadmissible in eminent domain valuation proceedings.⁹⁶ The Supreme Court of the United States has stated the reasons as follows:

⁹³ *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 282 (1943).

⁹⁴ *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923); *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 282 (1943).

⁹⁵ Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Act of January 2, 1971, 84 Stat. 1894, 1895.

⁹⁶ E.g., *Sharp v. United States*, 191 U.S. 341, 348-350 (1908); *St. Joe Paper Co. v. United States*, 155 F. 2d 93, 98 (C.A. 5, 1946); *Bank of Edenton v. United States*, 152 F. 2d 251, 258 (C.A. 4, 1946).

"It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject.***"⁹⁷

An exception has been recognized in that an offer to sell by the landowner from whom the property is being condemned may be proved *against* the owner as an admission of value when introduced by the condemnor.⁹⁸

A-16. *Settlement negotiations*: As early as its October 1876 term the Supreme Court noted that "upon well-recognized principles" an offer of compromise was inadmissible.⁹⁹

A-17. *Price paid by a condemnor for similar property*: Based upon a variety of reasons, e.g., that such payments are in the nature of compromise to avoid the expense and uncertainty of litigation and so are not fair indications of market value, that such evidence complicates the record, confuses the issue, is misleading, and, especially in condemnation cases, raises collateral issues as to the conditions under which such sales were made, the overwhelming view of the various federal courts is that the sum paid by the condemnor for similar land, even if condemnation proceedings have not begun, is inadmissible.¹⁰⁰ However, there is a small minority view under which evidence of purchases by the condemnor is admitted on the theory that objection to this type of evidence goes to its weight, not its competency.¹⁰¹

A-18. *Leaseholds*: Upon condemnation of a leased property, the lessee has the burden of establishing that the leasehold estate has

⁹⁷ *Sharp v. United States*, 191 U.S. 341, 349 (1903).

⁹⁸ *Erceg v. Fairbanks Exploration Co.*, 95 F. 2d 850, 854 (C.A. 9, 1938), cert. den. 305 U.S. 615; *United States v. Certain Land in Baltimore County*, 209 F. Supp. 50, 56 (D. Md. 1962).

⁹⁹ *Home Ins. Co. v. Balt. Warehouse Co.*, 93 U.S. 527, 548 (1876); *Southern Railway Co. v. Madden*, 235 F. 2d 198, 201 (C.A. 4, 1956); *United States v. Playa De Fior Land & Development Co.*, 160 F. 2d 131, 136 (C.A. 5, 1947); *Barnes v. South Carolina Public Service Authority*, 120 F. 2d 439, 440 (C.A. 4, 1941); 31A C.J.S. Evidence, Sec. 285, pp. 722-728. But see *Nash v. D. C. Redevelopment Land Agency*, 395 F. 2d 571 (C.A. D.C. 1967), cert. den. 393 U.S. 844. The *Nash* case places the District of Columbia Circuit out of harmony with other circuits and the law generally in this respect. Accordingly, appraisers should consult with attorneys concerning offers of compromise in District of Columbia cases.

¹⁰⁰ *Slattery Co. v. United States*, 231 F. 2d 37, 40-41 (C.A. 5, 1956); *United States v. Bailey*, 115 F. 2d 433, 434 (C.A. 5, 1940); *Evans v. United States*, 326 F. 2d 827, 831 (C.A. 8, 1964); *Hickey v. United States*, 208 F. 2d 269, 275 (C.A. 3, 1953), cert. den. 347 U.S. 919; *Murdock v. United States*, 160 F. 2d 358, 362 (C.A. 8, 1947); *United States v. 13,255.53 Acres of Land in New Jersey*, 158 F. 2d 874, 877 (C.A. 3, 1946); *United States v. Foster*, 131 F. 2d 3, 5 (C.A. 8, 1942), cert. den. 318 U.S. 767; *United States ex rel. T.V.A. v. Reynolds*, 115 F. 2d 294, 296 (C.A. 5, 1940).

¹⁰¹ See *Nash v. D. C. Redevelopment Land Agency*, 395 F. 2d 571, 575 (C.A. D.C. 1967), cert. den. 393 U.S. 844, and authorities cited in Circuit Judge McGowan's statement explaining why he believed the Government's petition for rehearing en banc should be denied.

some value over and above the rent reserved in the lease. The claim of the lease is limited to the legal estate discussed in his lease. However, see footnote 72a. The lessee cannot validly claim damages for periods beyond the expiration of the lease and this is so even though the lessee might expect from past experience that the lease would be renewed.¹⁰²

The value of a leasehold is the present worth of the amount, if any, by which the current fair market rental exceeds the rent which the tenant is obligated to pay under the terms of his lease for the term taken by the Government or for the unexpired term of the outstanding lease, whichever is shorter. Even though a lessee may control a substantial part of a property by leasehold, he generally has no compensable property right unless the rent he has to pay is less than the fair market rent for that period of time his interest is taken from him and only to that extent.¹⁰³

Sometimes it is necessary for the United States to acquire the temporary use of the land or property which is not rentable, or would be susceptible of leasing only to the Government. As in any acquisition where there is a paucity of market data, the quest must still be for fair market value or fair market rental value as the problem may require.¹⁰⁴ Frequently, it is known that the property will not be returned to its owner in the same physical condition as it was at the time of taking, in which event the appraisal should include, in addition to the rental value, the difference between the fair market value at the time of the taking and the value after the physical changes have been made.

During war time, the Government frequently condemns the right to use and occupy property for an indefinite period or for the duration of the emergency, or for a definite period with the right to renew for an additional indefinite number of periods. In such cases, the appraisal should be based on the fair rental value of the property for a convenient definite term, as a month, quarter, or year, so that periodic payments may be made as the use continues. In some instances where the period is not definite, the right to renew at the same rental may have value.¹⁰⁵

A-19. *Easements*: An easement denotes ownership of limited real

¹⁰² *Scully v. United States*, 409 F. 2d 1061, 1065 (C.A. 10, 1969).

¹⁰³ Defining the "true measure of compensation" for a leasehold as being the "fair market value of the leasehold, if any, over and above the rental charged," the Court of Appeals reversed the trial court in *United States v. 26,699 Acres of Land in Long and McIntosh Counties, Georgia*, 174 F. 2d 367, 368 (C.A. 5, 1949) because the trial judge had erroneously admitted testimony of anticipated profits and permitted the jury to take such profits into consideration for the purpose of determining the value of the unexpired lease. The opinion contains somewhat confusing language concerning "consequential damages." With respect to the noncompensability of consequential damages, see Sec. A-14, *supra*, pp. 29a-31.

¹⁰⁴ *Kinter v. United States*, 156 F. 2d 5, 7 (C.A. 3, 1946); *United States v. Toronto Nav. Co.*, 338 U.S. 396, 402 (1949).

¹⁰⁵ *Carlstrom v. United States*, 275 F. 2d 802, 809 (C.A. 9, 1960).

property rights; thus falling short of full fee simple estate ownership.

When an easement or servitude over land is condemned for the public use, the appraisal should be in the amount of the difference between the fair market value of the land before and the fair market value immediately after the imposition of the easement. Full consideration should be given to and due allowance made for the substantial enjoyment and beneficial ownership remaining to the owner, subject only to the interference occasioned by the taking and exercising of the easement.

In the case of easements such as those acquired for domestic electric, telephone or cable lines, where there is an established going rate per pole and per-line mile, such transactions may be considered among other market data. In the absence of better evidence of market value, the "before and after" method discussed above should be employed.

A-20. *Streets, highways, roads and alleys*: Under established federal law, only nominal compensation is due for streets, highways, roads and alleys acquired by condemnation unless the streets must be replaced.¹⁰⁶

There are sound reasons behind this rule. By dedication to use as streets or highways, long narrow strips of land are deprived of value except as thoroughfares, and, if there is no need to replace the street or highway, the condemnee sustained no loss from the taking but was benefited by being relieved of the cost of maintaining the lands as thoroughfares.

This is not to say that the condemnor pays nothing for the land constituting the streets. As has been judicially stated, "It is customary to say that the value of the land in the streets and alleys is 'reflected' in the value of the lots, and since this value must be paid for upon condemnation, it cannot be said that the condemnor acquired without cost the lands within the lines of the highway."¹⁰⁷

¹⁰⁶ "The overwhelming weight of modern authority is to the effect that a municipality, a county, a state, or other public entity is entitled to compensation for the taking of a street, road or other public highway *only to the extent that, as a result of such taking, it is compelled to construct a substitute highway.*" (Emphasis by court.) *California v. United States*, 169 F. 2d 914, 924 (C.A. 9, 1948); *Franklin County, Georgia v. United States*, 341 F. 2d 106 (C.A. 5, 1965); *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786, 790 (C.A. 4, 1945); *United States v. Des Moines County*, 148 F. 2d 448, 449, 160 A.L.R. 953 (C.A. 8, 1945), cert. den. 326 U.S. 743; *Woodville v. United States*, 152 F. 2d 735, 737 (C.A. 10, 1946), cert. den. 328 U.S. 842; *United States v. City of New York*, 168 F. 2d 387, 389-390 (C.A. 2, 1948); *Washington v. United States*, 214 F. 2d 33, 39, 42-44 (C.A. 9, 1954), cert. den. 348 U.S. 862; cf. *Fort Worth, Tex. v. United States*, 188 F. 2d 217, 222 (C.A. 5, 1951).

¹⁰⁷ *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786, 790 (C.A. 4, 1945).

In the case of the taking of land from a subdivider, the justice of saying that the value of the streets is reflected in the abutting lots is even more evident, for there the subdivider has sold the lots at higher prices to begin with because they have street frontage. Indeed, in most instances, the subdivider dedicates the streets to public use free of charge because of the resulting enhancement. Thus, to force the condemnor to pay for streets as if they had a value of their own and to pay for the lots an enhanced value contingent upon their abutting upon the streets would be to compel the condemnor to pay twice for the streets.

If there is a necessity for the governmental unit from which the street has been taken to replace the street, then the cost of that replacement becomes the measure of the condemnee's loss rather than market value, the usual standard.¹⁰⁸

A-21. *Taylor Grazing Permits.* A rancher is not entitled to compensation for any value added to the fee by revocable permits authorizing the use of adjoining public lands issued under the Taylor Grazing Act, because such permits create no property rights. Accordingly, the Government as condemnor may not be required to compensate a condemnee for elements of value which the Government has created, or which it may have destroyed under the exercise of governmental authority other than the power of eminent domain.^{108a}

B. DATA DOCUMENTATION AND APPRAISAL REPORTING STANDARDS

B-1. *Contents of appraisal report:* The text of the appraisal report shall be divided into four parts as outlined below:

PART I—INTRODUCTION

1. *TITLE PAGE.* This shall include (a) the name and street address of the property, (b) the name of the individual making the report, and (c) the effective date of the appraisal.

2. *TABLE OF CONTENTS.*

3. *LETTER OF TRANSMITTAL.*

4. *PHOTOGRAPHS.* Pictures shall show at least the front elevation of the major improvements, plus any unusual features. There should also be views of the abutting properties on either side and that property directly opposite. When a large number of buildings are involved, including duplicates, one picture may be used for each type. Views of the best comparables should be included whenever possible. Except for the overall view, photographs may be bound as pages facing the discussion or description which the photographs concern.^{108b} All graphic material shall include captions.

¹⁰⁸ *United States v. City of New York*, 168 F. 2d 387, 389-390 (C.A. 2, 1948).

^{108a} *United States v. Fuller*, 409 U.S. 488 (1973).

^{108b} As noted, *supra* p. 11, all photographs should show the identification of the property, the date taken, and the name and address of the person taking the photograph.

5. *STATEMENT OF LIMITING CONDITIONS AND ASSUMPTIONS.*

6. *REFERENCES.* If preferred, may be shown with applicable approach.

PART II—FACTUAL DATA

7. *PURPOSE OF THE APPRAISAL.* This shall include the reason for the appraisal, and a definition of all values required, and property rights appraised.

8. *LEGAL DESCRIPTION.* This description shall be so complete as to properly identify the property appraised. If lengthy, it should be referenced and included in Part IV. If furnished by the Government and would require lengthy reproduction, incorporate by reference only.¹⁰⁹

9. *AREA, CITY AND NEIGHBORHOOD DATA.* This data (mostly social and economic) should be kept to a minimum and should include only such information as directly affects the appraised property together with the appraiser's conclusions as to significant trends.

10. *PROPERTY DATA :*

a. *Site.* Describe the soil, topography, mineral deposits, easements, etc. A statement must be made concerning the existence or nonexistence of mineral deposits having a commercial value. In case of a partial taking, discuss access both before and after to remaining tract. Also discuss the detrimental and hazardous factors inherent in the location of the property.¹¹⁰

b. *Improvements.* This description may be by narrative or schedule form and shall include dimensions, cubic and/or square foot measurements, and where appropriate, a statement of the method of measurement used in determining rentable areas such as full floor, multitenancy, etc.

c. *Equipment.* This shall be described by narrative or schedule form and shall include all items of equipment, including a statement of the type and purpose of the equipment and its state of cannibalization. The current physical condition and relative use and obsolescence shall be stated for each item or group appraised, and, whenever applicable, the repair or replacement requirements to bring the property to usable condition.

Any related personalty or equipment, such as tenant trade fixtures, which are not attached or considered part of the realty, shall be separately inventoried. Where applicable, these detachable or individually owned items shall be separately valued.

d. *History.* State briefly the purpose for which the improvements were designed, dates of original construction and major renovation and/or additions; include, for privately owned property, a ten-year record as to each parcel, of all sales and, if possible, offers to buy or sell, and recent lease(s); if no sale in the past ten years, include a report of the last sale.

e. *Assessed value and annual tax load.* Include the current assessment and dollar amount of real estate taxes. If the property is not taxed, the appraiser

¹⁰⁹ A more detailed standard concerning the legal description of the property to be appraised appears, *infra*. See B-2, p. 38.

¹¹⁰ Detrimental and hazardous factors are present to some extent on practically all properties, with some areas and properties having much more serious factors of this nature than are normally found. Appraisers should determine the types of nuisances and detrimental factors present, such as odors, undesirable businesses, dumps, land fills, noxious weeds, etc. With respect to farm properties it is especially important that appraisers consider the area hazards such as noxious weeds, incidence of hail, floods and droughts, and annual variations in crop yields. Appraisers should list and describe all factors that may be undesirable and estimate the extent of their effect.

shall estimate the assessment in case it is placed upon the tax roll, state the rate, and give the dollar amount of the tax estimate.

f. Zoning. Describe the zoning for subject and comparable properties (where Government owned, state what the zoning probably will be under private ownership), and if rezoning is imminent, discuss further under item 11.¹¹¹

PART III—ANALYSES AND CONCLUSIONS

11. *ANALYSIS OF HIGHEST AND BEST USE.* The report shall state the highest and best use that can be made of the property (land and improvements, and where applicable, machinery and equipment) for which there is a current market. The valuation shall be based on this use.

12. *LAND VALUE.* The appraiser's opinion of the value of the land shall be supported by confirmed sales of comparable, or nearly comparable lands having like optimum uses. Differences shall be weighed and explained to show how they indicate the value of the land being appraised.

13. *VALUE ESTIMATE BY COMPARATIVE (MARKET) APPROACH.* All comparable sales used shall be confirmed by the buyer, seller, broker, or other person having knowledge of the price, terms and conditions of sale. Each comparable shall be weighed and explained in relation to the subject property to indicate the reasoning behind the appraiser's final value estimate from this approach.

14. *VALUE ESTIMATE BY COST APPROACH, IF APPLICABLE.* This section shall be in the form of computative data, arranged in sequence, beginning with reproduction or replacement cost, and shall state the source (book and page if a national service) of all figures used. The dollar amounts of physical deterioration and functional and economic obsolescence, or the omission of same, shall be explained in narrative form. *This procedure may be omitted on improvements, both real and personal, for which only a salvage or scrap value is estimated.*¹¹²

15. *VALUE ESTIMATE BY INCOME APPROACH, IF APPLICABLE.* This shall include adequate factual data to support each figure and factor used and shall be arranged in detailed form to show at least (a) estimated gross economic rent or income; (b) allowance for vacancy and credit losses; (c) an itemized estimate of total expenses including reserves for replacements.¹¹³

Capitalization of net income shall be at the rate prevailing for this type of property and location. The capitalization technique, method and rate used shall be explained in narrative form supported by a statement of sources of rates and factors.

16. *INTERPRETATION AND CORRELATION OF ESTIMATES.* The appraiser shall interpret the foregoing estimates and shall state his reasons why one or more of the conclusions reached in items (13), (14), and (15) are indicative of the market value of the property.

17. *CERTIFICATION.* This shall include statement that Contractor has no undisclosed interest in property, that he has personally inspected the premises, date and amount of value estimate, etc.

¹¹¹ See in this connection B-3, *infra*, p. 39.

¹¹² See in this connection the discussion under A-6, *supra*, pp. 11-13.

¹¹³ See in this connection the discussion under A-7, *supra*, pp. 13-16.

PART IV—EXHIBITS AND ADDENDA

18. *LOCATION MAP*.¹¹⁴ (Within the city or area)
19. *COMPARATIVE MAP DATA*. Show geographic location of the appraised property and the comparative parcels analyzed.
20. *DETAIL OF THE COMPARATIVE DATA*.
21. *PLOT PLAN*.¹¹⁴
22. *FLOOR PLANS*.¹¹⁴ (When needed to explain the value estimate.)
23. *OTHER PERTINENT EXHIBITS*.
24. *QUALIFICATIONS*. (Of all Appraisers and/or Technicians contributing to the report.)

B-2. *Legal description of the property*: It is essential that the appraiser obtain an accurate legal description of the property rights to be appraised and that he then appraise the exact property rights described. The appraiser should be furnished with such an accurate legal description when he receives the appraisal assignment. If for any reason that is not done, the appraiser is responsible for obtaining an accurate legal description of the property rights to be appraised before endeavoring to make his appraisal. It should never be necessary for a client to be unable to adduce the testimony of an appraiser because he has not appraised the specific legal property rights involved.

The appraiser should verify the legal description both "on the ground" as the physical inspection of the property is made and by comparing it with city or county maps; aerial maps, as available in county or other governmental offices; and with records available in the recorder's, auditor's, assessor's, tax collector's or other appropriate city or county offices. If an error of significant importance is discovered, the appraiser should consult the person from whom the appraisal assignment was received before proceeding with the appraisal. If a minor error is discovered which it is believed will not effect the completion of the assignment, the appraiser should make a note of explanation in the appraisal report, making reference to it in the legal description given in the assignment.

The rights the owner has must be determined whether such rights constitute a fee simple title, a life estate, an easement, leasehold or other property right. Easements, mineral rights, rights of way, or any exception in the description which limits the use of the property or grants certain uses to others, should be carefully ascertained. It should be borne in mind that legal descriptions contained in letters seldom make any reference to easements or other exceptions. These items of information may have to be gained from interviews, inspec-

¹¹⁴ All maps and plans may be bound as facing pages opposite the description, tabulation, or discussions they concern.

tion of the property, abstracts or certificates of title, title insurance policies, or other documents related to the subject property.

B-3. *Zoning regulations*: Zoning is a factor to be considered in evaluating property. Accordingly, if the property to be appraised is in a zoned area, recite the restrictions in the appraisal report, giving particular attention to the effect on salability of the property. A more profitable operation than the use of the property at the time of the taking can be considered if the more profitable operation is one allowed by law to be carried out on the premises.¹¹⁵ However, " * * * if existing zoning restrictions preclude a more profitable use, ordinarily such use should not be considered in the evaluation."¹¹⁵ Thus, if there is a reasonable possibility that zoning classification will be changed, this possibility should be considered in arriving at the proper value; but it should be considered only to the extent that the "possibility" would have affected the price which a willing buyer would have offered for the property just prior to the taking.¹¹⁵

B-4. *Updating of appraisals*: When appraisals have been made any substantial period in advance of the date of negotiations for purchase contracts or the filing of a petition requesting right of possession or a complaint or declaration of taking in condemnation proceedings, the appraisals must be carefully reviewed and brought up to date in order to reflect current market conditions. This is required, notwithstanding that it is incumbent upon the appraiser to recognize the general market value trends and carefully consider the value of the property if offered for sale over a reasonable period of time. Any change in the value estimate attributable to trending or updating should be fully supported by acceptable market evidence rather than by reference to a market index based on unidentified information.

For trial purposes, in order for the testimony of the appraiser to be accorded maximum weight by the trial tribunal, it is important that the appraisal reflects (1) the value as of the date of taking and (2) the precise estate described in the complaint or any amendment thereof. That date is normally the date on which a declaration of taking is filed, or the date of possession if it preceded the date of filing of a declaration of taking. Where only a complaint has been filed, without being accompanied by a declaration of taking, and possession has not been taken, the valuation is to be as of the date of trial and it is important that appraisals be updated accordingly.

¹¹⁵ *United States v. Meadow Brook Club*, 259 F. 2d 41, 45 (C.A. 2, 1958), cert. den. 358 U.S. 921.

B-5. *Evidence in legal proceedings:* The appraiser must bear in mind that he may be called upon, in condemnation proceedings or otherwise, to establish the validity and competence of his estimates. He must, therefore, familiarize himself with and be guided by basic rules of trial evidence so that his testimony will be admissible and of probative value. Since, as a witness, he must be prepared to offer convincing testimony, his report should contain an analysis of all factual data upon which his estimates are based.

C. GENERAL STANDARDS OF A MISCELLANEOUS NATURE

C-1. *Importance of thorough appraisals:* Accurate appraisals, based upon sound legal principles and made by competent, qualified appraisers, are necessary properly to protect the interests of the Government and to expedite payment of just compensation to property owners.

All appraisals should be made with recognition of the possibility that the question of value may be litigated, since it is not possible to predetermine how many tracts within an area will be acquired by voluntary conveyance. Accordingly, in making all appraisals, a complete, detailed inspection of the property and full consideration of applicable legal principles are necessary so that there may be an adequate presentation of the Government's case.

The unique nature of land has long been recognized. With many expendible commodities, the field of duplication is practically unlimited and supply or production is capable of seasonal control to meet the demand. This is not so with land. This fact places the real estate transaction—whose very heart is the fair market value estimate or appraisal—on a higher and more complicated plane than those involving expendible commodities. Accordingly, the importance of sound appraisals cannot be overemphasized. This is so not only because the courts have established basic rules governing exercise of the power of eminent domain but because of the Government's obligation to serve the general public and to protect the common welfare by paying just compensation whenever private property is needed for public use.

C-2. *Responsibility of the appraiser:* As detailed further under the heading "Impartiality," *infra*, p. 42, it is expected that the appraiser will be unbiased in his work. He must exercise sound judgment based upon all known pertinent facts and circumstances and it is his responsibility to obtain knowledge of all pertinent facts

and circumstances which can be acquired with diligent inquiry and search. He must then weigh and consider the relevant facts with good judgment and make his decision, entirely on his own, in a sound professional manner, completely unbiased by any consideration favoring either the owner or the Government. The appraisal report should be documented and supported so as to convince an impartial reader of the soundness of the appraiser's estimates, within the limits of integrity, judgment and ethics.

If called upon to testify, the appraiser should marshal his facts and opinions so as to adduce them in a clear, concise and sincere manner. It should never be necessary for court or counsel to request an appraiser to speak more loudly in order for him to be heard. Unless the jury, commissioners or court can hear him, the appraiser cannot possibly achieve the very purpose of his employment, i.e., to convince the tribunal which will determine the award or verdict of the soundness of his estimate of value. The appraiser should set high standards of performance and he should render the best possible service.

Appraisers are urged to bear in mind that the reputable member of his profession has little to offer except his adequately supported judgment. To enjoy the fruits of his labor he must be the personification of honesty and integrity. He can be counted on to do what is right and fair. He will not barter his personal honor or lower his standards for personal gain. He rigidly must adhere to ethical rules of conduct in his relations with his employers and with the public. His most profitable and worthwhile asset is his reputation for these things. If his appraisals are prepared in the true spirit of these high standards of personal service, the fulfillment of the appraiser's important responsibilities will be complete.

In order to be properly prepared to testify as to value in court, and to render the utmost assistance to counsel in preparation for trial, it is necessary that appraisals for purposes of eminent domain be made with consideration being given to all relevant methods. While the appraiser may be positive that only one method or theory is sound, neither he nor trial counsel can predict the scope of the cross-examination or the evidence which will be adduced by the opposing party, as to which the appraiser may be called to testify in rebuttal. Accordingly, the appraiser should give thought to all possible methods and theories and be prepared to explain why he considers those not relied upon to be irrelevant to the appraisal problem at hand.

C-3. *Impartiality*: It is not the function of an appraiser to be an advocate. That is a role exclusively reserved to the attorney. The appraiser is employed to express his own opinion, which, to warrant being accorded weight, must be supported with factual data.¹¹⁶ While it is important that an appraiser testify with sincerity in support of his views, it is also important that he bear in mind that it is neither his property nor his money and his only function is to testify to his impartial opinion of value. When a witness assumes the role of an advocate he is apt to harm both himself and his client's case.

An appraiser, whether staff or contract, who has a present, prospective, or future interest in a property, the owners, mortgagees, or other lienholders is, for obvious reasons, ineligible to appraise the particular property.

C-4. *Control of Composure*: Appraisers have been well advised that "Cross-examination is the anvil of truth and you must be prepared for a thorough hammering."¹¹⁷ The author of that advice cautioned appraisers to bear in mind that it is the function of the cross-examiner to discredit the witnesses' testimony in the eyes of the jury and that if the witness loses his temper, the cross-examiner has largely accomplished his purpose since "Anger is the sign of defeat and capitulation."¹¹⁸

C-5. *Contacting landowners*: During the course of his personal inspection of a property being appraised, the appraiser is expected to see and talk personally to the owner or, in the owner's absence, his agent or representative. It is to be borne in mind that the appraiser is usually the first personal contact of the owner with a representative of the Government with important responsibilities in connection with the acquisition of his land. The owner is generally a prime source of detailed information concerning the history, management and operation of his property. In compliance with the provisions of Subsection 301(2) of P.L. 91-646, approved January 2, 1971, 84 Stat. 1894, 1906, the owner or his designated representative

¹¹⁶ " . . . Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts upon which it is based." *Washington v. United States*, 214 F. 2d 33, 43 (C.A. 9, 1954), cert. den. 348 U.S. 862. The same Court of Appeals had earlier stated that "Where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis for value by the Court, the evaluation will be set aside and the cause remanded for new findings." *United States v. Honolulu Plantation Co.*, 182 F. 2d 172, 178 (C.A. 9, 1950), cert. den. 340 U.S. 820; *International Paper Co. v. United States*, 227 F. 2d 201, 205 (C.A. 5, 1955).

¹¹⁷ Horgan, "Ten Courtroom Commandments for Appraisers," *Right of Way* (Vol. 6, No. 5, Oct. 1959), p. 25.

¹¹⁸ *Ibid.*

must be given an opportunity to accompany the appraiser during his inspection of the property.

C-6. *Contracting for appraisal services:* Contracts for appraisal services will be let as a result of negotiations with adequately qualified appraisal firms, corporations, or individuals in connection with specific appraisal problems. The appraisal of real estate is a recognized profession governed by strict codes of ethics and, accordingly, negotiations for proposals should be conducted on an individual basis.

C-7. *Confidential nature of appraisals:* Appraisers' valuations and supporting appraisal reports are confidential information and the appraiser should not divulge his findings and opinions to anyone except authorized officials of the Government.

C-8. *Appraisal review:* Under long established governmental procedures, each appraisal is carefully reviewed by a qualified reviewing appraiser of each agency having acquisition responsibility to determine whether the appraisal is adequately supported; whether it complies with recognized appraisal practices; and whether it conforms to governing legal premises as prescribed by legal counsel. Prior to adoption of appraisals of property having more than token value or involving highly complicated appraisal problems, the reviewing appraiser for each agency will attach to the report a written memorandum indicating the scope of his review and supporting the action recommended by him.

UNITED STATES ATTORNEYS' MANUAL
TITLE 5—LAND AND NATURAL RESOURCES DIVISION

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1984 USAM (superseded)

FOREWORD

These standards for the preparation of title evidence incorporate cumulative experience of the Land Acquisition Section in the examination of thousands of titles involving tens of millions of dollars in real property annually. The standards are designed to meet present-day conditions, practices, and procedures. They are applicable throughout the United States to the most valuable city properties and the least valuable waste lands. They have been adopted to protect Federal investments in real property by securing title evidence tailored to the value of the property acquired and its attendant circumstances at reasonable charges with due regard to speed in the consummation of each transaction and due care for the right of property owners.

The standards govern the preparation of evidence of title for all land acquisitions by the United States, by direct purchase from the owner, condemnation, donation or exchange, where the title is to be approved by the Attorney General or his delegee or condemnation proceedings are to be instituted.

Public Law 91-393, approved September 1, 1970, 84 Stat. 835, amending R.S. 355 of the Revised Statutes (40 U.S.C. 255) authorized the Attorney General to delegate, subject to his general supervision, his responsibility for the approval of titles to lands acquired by the United States to other departments and agencies under regulations promulgated by the Attorney General. Upon the request of such departments or agencies, title opinions of the Attorney General will be rendered under the practice prevailing prior to this amendment.

Attention is invited to the revised form of title insurance policy and the form of endorsement thereto set out on pages 19 and 24. These forms have been approved by the American Land Title Association for use by its members and should be of material benefit both to the Government and to the title companies.

Where particular title questions arise which are not covered here, where title difficulties cannot be resolved readily, where the cost of title evidence or insurance seems disproportionately high compared to the value of the property being acquired, or otherwise unnecessarily expensive, and where unreasonable delays are foreseen or are incurred in securing title evidence, or clearing title defects, the Land and Natural Resources Division may be consulted. We will render any assistance in resolving such questions to accomplish a fair, efficient, economical, and expeditious acquisition.

SHIRO KASHIWA,
Assistant Attorney General,
Land and Natural Resources Division.

STANDARDS FOR THE PREPARATION OF TITLE EVIDENCE IN LAND ACQUISITIONS BY THE UNITED STATES

The following standards have been prepared for the guidance of Government departments and agencies, vendors to the United States, attorneys of the Department of Justice, and others having occasion to prepare or procure evidence of title and related papers in all cases of acquisition of land by the United States by purchase or condemnation. These standards supersede all previous rules on the subject. Their observance is required where the titles are to be approved by the Attorney General or his delegee and where the title is acquired by condemnation unless exception is made in unusual circumstances.

RESPONSIBILITY FOR PROCURING EVIDENCE OF TITLE

In direct purchase cases it is the duty of the heads of the acquiring agencies to furnish necessary evidence of title to land to be acquired by direct purchase, exchange, or donation, the expense of procuring the same to be paid out of the appropriations made for the respective departments (40 U.S.C. 255, as amended).

In condemnation proceedings, generally, the necessary evidence of title is made available to the Department by the acquiring agency. In compliance with applicable standards, title evidence conforming to the requirements of the Department should be obtained from approved abstracters or title companies. Contracts for the title evidence should include as a separate item the costs of any necessary continuation of the evidence of title.

Title evidence must be obtained promptly to avoid delay in payment to landowners and to permit early consummation of purchases and closing of condemnation proceedings.

EVIDENCE OF TITLE ACCEPTABLE TO PRUDENT ATTORNEYS AND TITLE EXAMINERS IN THE LOCALITY IN WHICH THE LAND IS SITUATED WILL ORDINARILY BE ACCEPTABLE TO THE DEPARTMENT

One of the following types of evidence should be obtained after considering local practice, reliability, security, economy, efficiency and speed:

(a) Abstracts of title prepared in accordance with the requirements of these instructions, by approved abstracters, or by qualified and competent abstracters employed by a department or agency of the Government.

(b) Certificate of title (see form on page 14) prepared in accordance with the requirements set forth below concerning form and contents of certificates of title, by approved title corporations in jurisdictions where corporations may legally issue such certificates.

(c) Owners' duplicate certificates of title issued pursuant to satisfactory state systems of title registration similar to the Torrens system.

(d) Copies of public title records duly authenticated by their official custodian or certified by an approved abstracter.

(e) Title insurance policies (see form on page 19) prepared, in accordance with the requirements set forth in these standards, by approved insurance corporations.

(f) Any other satisfactory evidence of title.

Ordinarily one abstract, certificate or policy will be obtained for all interests in each contiguous area of land in the same ownership. Lands will be deemed to be contiguous although portions thereof are separated by roads, railroads or other rights of way, streams, etc. Where oil, gas and mineral interests are not to be acquired, all leases and other instruments relating to such instruments should be omitted from the title evidence pursuant to the contracts therefor.

QUALIFICATIONS OF ABSTRACTERS AND TITLE COMPANIES

All title evidence must be obtained from attorneys, abstracters or title companies approved by the Department or the authorized department or agency for the preparation of such evidence in the jurisdiction in which the lands are situated. To obtain approval, there should be submitted for consideration information as to the experience and training; organization and title plant of any title corporation; system of examining and abstracting title; financial responsibility (if a corporation); reputation in the community; and whether statutory bonding and other requirements have been complied with.

Individual abstracters must be attorneys at law or professional or official abstracters qualified and authorized by law to prepare and certify to abstracts; have no interest in the land to be acquired; and not be related to the vendors.

Title companies must be qualified and authorized by law to furnish abstracts, certificates of title, or title insurance policies in the state

where the land lies; and have either its home office or a well-established branch office located in the state where the land lies.

FORM AND CONTENTS OF ABSTRACTS

In some sections of the country, and in many of the large cities, abstracts are prepared by an incorporated title company or by a professional or official abstracter, not necessarily an attorney. In other sections of the country the abstracts are prepared by an attorney who also obtains curative data and frequently supplements the abstract with a history of the title and his opinion as to its sufficiency. The following requirements are, therefore, subject to modification to adapt them to the type of abstract commonly in use in the locality where the land is situated:

(a) *Form and arrangement.*—The abstract should be printed or typewritten (or consist of photostatic copies of original documents), and the description of the land covered by the abstract should appear on a caption page. Where the descriptions in abstracted items are the same as those contained in the captions, or in preceding instruments, the descriptions should not be recopied, but the abstracters should indicate that the same lands are involved. The various entries should be numbered and appear in the chronological sequence of recording. Affidavits and other papers submitted by the abstracter with the abstract should be numbered or lettered and referred to by such number or letter in the item of the abstract to which they relate.

(b) *Contents, in general.*—The abstract should contain a sufficient summary of the material portions of every recorded instrument, affecting the title to the land described in the caption, to enable the examiner to determine the nature and effect of such instruments. No attempt is made to specify all items which must be shown in the abstract, but the following, which are sometimes omitted, must be shown exactly as they appear in the records: The marital status of all grantors and grantees; the consideration and receipt thereof; the dates of execution, witnesses where necessary, acknowledgment, and recordation of each instrument; and the due date of any unsatisfied mortgages or deeds of trust, the amount of the indebtedness secured thereby; and any reservations, limitations or conditions. Releases of homestead, dower, and other statutory rights should be affirmatively shown. Where titles to separate parcels are derived from a common preceding chain of title, a master abstract should be prepared and supplemented by individual abstracts.

(c) Abstracts containing instruments which do not affect the title or do not refer to or mention the land covered by the abstract are not acceptable and the abstracter is not entitled to receive payment

for such extraneous material. Also, abstracts which contain illegible photostats of instruments are not acceptable.

Period of Search

For the purposes of this paragraph, "title instrument" means any recorded instrument purporting to evidence the transfer of a fee simple title (other than as security for debt), including patents, direct deeds of conveyance, deeds by trustees, referees, guardians, executors, administrators, masters, or sheriffs, wills or decrees of descent, and also decrees, judgments or orders of courts of competent jurisdiction purporting to quiet, confirm, or establish title in fee simple. The "period of search," referred to in each of the numbered subparagraphs hereinafter set out, means the number of years of continuous coverage by an abstract of the record beginning with a title instrument recorded at least the required minimum number of years prior to the date of the abstracter's certificate. Regardless of the applicable period of search, all abstracts must contain or be accompanied by proof that the title was originally divested from the sovereign by patent or grant of the land involved. All mineral or other reservations to the sovereign shall be specifically noted. All instruments antedating the applicable period of search which are disclosed by instruments recorded within the period of search and which contain reservations, exceptions, restrictions, limitations, or other rights or interests or impose conditions or liens possibly outstanding or affecting the title, must be shown. Subject to all the foregoing provisions of this paragraph, the periods of search shall be as follows:

(1) A minimum of 60 years as to all acquisitions (including easements) except those mentioned in the following subparagraphs (2), (3), (4), and (5).

(2) A minimum of 80 years as to all tracts to be acquired for considerations in excess of \$100,000.00 and as to Federal building sites.

(3) A minimum of 40 years as to lands of small value.

(4) A minimum of 25 years as to the acquisition of easements to be acquired for considerations in excess of \$100 but not in excess of \$5,000.00 as follows: For telephone and telegraph lines, electric transmission lines, channel excavation, relocation of utilities such as fire alarm systems, water mains and pipes, pipelines, railroad spurs for temporary use in transporting materials for construction purposes, access and other roads, highways, spoil disposal, intermittent flowage (where the estimated frequency of flooding is not

oftener than 5 years), borrow pits, and other uses of the general character and type of those herein specified.

(5) As to easements to be acquired for considerations of \$100 or less and temporary use or term takings in condemnation proceedings involving the payment of an estimated rental of \$2,500 or less per annum, last owner searches showing the owner under the last deed of record and encumbrances against the title under which the abstracters or title companies assume no liability and without regard to the period of search may be accepted as satisfactory title evidence.

(6) Abstracts relating to acquisitions of all other easements must be prepared in accordance with the applicable preceding subparagraphs in the same manner as abstracts relating to fee simple titles.

Records Lost or Destroyed

Where title records, for the full periods of search required above, have been lost or destroyed, or are otherwise permanently unavailable, the abstract should begin with the first available record and be supplemented by the following:

(1) A certificate of the abstracter as to the fact of the loss or destruction of the records, that no reservations, limitations, encumbrances, or defects in the title are known to the abstracter, and that the beginning point of the abstract is accepted by competent attorneys in the community, and either:

(a) Proof of compliance with requirements of statutory proceedings, if any, to establish titles affected by the loss or destruction of the records; or

(b) Secondary documentary evidence, complying with statutory requirements, which, if offered in a judicial proceeding, would be admissible as evidence of title, and evidence of title by adverse possession as provided in the instructions set out below under Adverse Possession.

Wills and Probate Proceedings

Wills should be reproduced in full. Essential portions of probate proceedings disclosing all material facts of record must be shown, including, for example, the petition, names and ages, and the incompetency, if any, of parties in interest as shown by the record; proof of service of citations; date of approval of bond; issuance of letters testamentary; publication of notices or other action necessary to start the running of any statutes of limitations; ancillary probate of the will in the jurisdiction where the land lies, if the original probate were elsewhere; guardianship proceedings of any parties

who are incompetent; and whether estate and inheritance taxes have been paid or releases thereof obtained.

When title has been or is to be conveyed by administrator's or executor's deed, the court orders or other authority of the fiduciary and sufficient portions of the proceedings to demonstrate their regularity must be shown.

If the title has been or is to be conveyed by the devisees, the abstract should show whether all specific legacies, debts, and taxes have been paid, and where necessary whether there has been final distribution of the estate, discharge of the executor, and closing of the estate.

Title by Descent

In every instance where title has passed by descent, the abstract should show whether there has been administration on the estate, and in case of administration, the abstract should show sufficient portions of the record of the proceeding to determine whether necessary jurisdictional facts existed and statutory requirements essential to the validity of the proceeding were observed, including service of necessary notices, qualifications of the administrator, and the date of the approval of his bond or other action necessary to start the running of any statutes of limitation.

If there has been administration, but title has been or is to be conveyed by deed of the intestate's heirs as established in the proceeding, the abstract should show the correct names of all persons determined to be heirs as they appear in the proceeding, and should also show whether debts and charges, including all taxes against the estate, have been paid or provided for, and, where necessary, whether there has been final distribution of the estate and discharge of the administrator.

Whether or not there has been administration, if the conveyance to the United States is to be made by the intestate's heirs, and the intestate's heirs have not been established in a judicial proceeding, determination of heirship will be required as hereinafter provided.

Foreclosure Proceedings

In all cases involving foreclosure proceedings the abstract should disclose sufficient of the mortgage foreclosed to determine the validity and effect of the foreclosure, including the sum secured, description of the premises, conditions of the mortgage, signatures, dates of execution and recording, and the nature of the default.

If the foreclosure is by judicial proceeding, the abstract should

show the names of all persons made parties to the foreclosure case and sufficient portions of the record to determine the jurisdiction of the court, the regularity of the proceeding, whether all necessary parties had proper notice, and whether the provisions of the foreclosure statute were adequately observed.

If foreclosure is under a power of sale, the terms of the power, compliance or noncompliance therewith and with applicable statutory provisions, should appear. Partial or installment foreclosures, continuing the balance of the mortgage in effect, must be affirmatively shown.

Sales by Receivers, Execution Sales, Tax Sales, Divorces, and Other Judicial Proceedings

The abstract should fully disclose sufficient portions of the record of all sales by receivers, execution sales, tax sales, divorces, and other judicial proceedings affecting the title to the land to be acquired, to determine the legal effect of such sales or proceedings, and whether all statutory requirements have been observed and the time for redemption, appeal, or reopening the matter has expired.

Sales by Trustees and Others in a Fiduciary or Representative Capacity

The abstract should contain all essential parts of trust instruments, powers of attorney, and of the record of any court proceedings conferring authority for conveyances in the chain of title by fiduciaries or persons acting in a representative capacity, and show whether the purchaser is relieved of the responsibility for the application of the purchase price. Any conditions or limitations on the authority of a fiduciary or representative, contained in such instruments or proceedings, or in any deed to the trustee, or to the beneficiary or principal for whom such trustee or representative is acting, should be fully set forth and, where possible, the abstract should show whether such conditions have been fulfilled.

Search for Liens of Judgments and Decrees of Federal Courts

Search is required of the Federal court records in all divisions of the district where the land lies for possible liens of judgments and decrees of and cases pending in Federal courts in those states which have not enacted a statute authorizing the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements

relating to the judgments and decrees of the courts of the state. (28 U.S.C. 1962.)

In those states which have enacted such conformity statutes (in accordance with the provisions of 28 U.S.C. 1962), no search of the Federal court records is necessary for liens of judgments and decrees, unless under state law judgments and decrees of the state courts become liens on the property of the judgment debtor in the county where rendered, upon entry in the court where rendered, in which case search of the Federal court records is necessary if those records are located in the county in which the land is situated.

Dedication and Vacation of Streets and Alleys

Where the land includes streets or alley areas, dedicated or vacated, there must be shown all matters of record affecting the ownership of such areas, including the following:

- (a) The complete proceeding had upon such dedication and, if vacated, the vacation proceedings.
- (b) All facts of record bearing on the existence or elimination of prior rights of the public, prescriptive or otherwise, and rights of public utilities, if any.

Special Assessments for Improvements, School Districts, Etc.

Abstracts containing references to assessments for drainage, school, or other special improvement districts, water, paving, sewer and other assessments, should set out, in addition to the current and delinquent assessments, the total benefit assessments and charges against the land, and should contain references to the statutes creating the districts and establishing the liens.

Abstracter's Certificate

A satisfactory certificate of the abstracter must be made a part of the abstract. Generally, certificates will be acceptable if in the form approved by a title association of recognized standing in the state where the land is situated and if the abstracter certifies that he has examined all public records pertaining to the title for the required period of search, and that all matters of record affecting the title are correctly shown in the abstract. In those states where the liability of the abstracter is based upon the contract to search the title, the certificate should contain a statement that the abstract is furnished to the United States of America (or its grantor) and assigns. Otherwise, and generally, the certificate should not be limited to any contracting party, other person or corporation.

FORM AND CONTENTS OF CERTIFICATES OF TITLE AND TITLE INSURANCE POLICIES

Preliminary reports or binders, when satisfactory in form, of approved title companies based upon a preliminary search and committing such companies to issue final certificates of title or title insurance policies in the approved form, will be accepted, as a basis for preliminary opinions which contemplate further submission of the matter for final approval of title. See forms on pages 14 and 19 of these standards.

The certificate of title, title reports and binders must disclose the name of each person in whom title to any interest is vested of record or known to the company. Where the subsurface easements or other interests in the property to be acquired are owned by persons other than the owners of the fee title, the present record ownership of each such outstanding estate or interest and all data of record relating thereto or sufficient portions thereof shall be shown in the certificate of title or data relating to such interests. The addresses of all parties having any interest in the lands must be set out where this information is disclosed by the public records or known to the company.

Schedule "B" of the certificate or report must disclose all essential information on matters affecting the title which are set up in the schedule as exceptions or objections to the title. Schedule "B" shall not set forth exceptions or objections in general terms or by reference to deeds, instruments, proceedings or other matters of record, without including copies or a sufficient abstract or digest of the instruments or the proceedings or other matters of record creating or imposing the rights, interests, or encumbrances mentioned in Schedule "B," to enable an attorney examining the certificate to determine the nature and extent of such matters and their effect on the validity of the title to the land described in Schedule "A." The names of the persons holding such interests from whom releases must be obtained must be furnished by the company, if known.

Period of Search

In general, certificates of title and title insurance policies based upon a search of all records affecting the title and unqualified as to the period of search are preferred and should be issued. However, as to specific types of easements as defined in the instructions relating to abstracts, certificates of title or title insurance policies may be limited to the periods of search prescribed in those instructions provided the certificates or policies contain statements to the effect that the title of the sovereign has been divested, and set forth any reservations which are contained in the patents or grants.

Limitation of Liability

A certificate of title or title insurance policy by one title company for a single acquisition valued at more than 25 percent of the admitted assets (after deducting existing liabilities secured or unsecured and excluding any trust or escrow funds) of the issuing company is not acceptable.

Generally, certificates of title or title insurance policies shall not limit the liability of the title company to a sum less than 50 percent of the reasonable value of the property; however, as to acquisitions valued at more than \$50,000, the limitation of liability of the issuing title company under the certificate of title or title insurance policy may be limited to 50 percent of the first \$50,000 and 25 percent of that portion of the value in excess of that amount. Certificates of title and title insurance policies which provide that the United States is required as co-insurer or otherwise to assume any portion of the limited liability are not acceptable.

PLATS

The title evidence should include or be accompanied by a plat or plan, based on a survey by a competent surveyor or engineer, sufficient to enable the examining attorney to locate the land described in the title evidence. Any encroachments or rights of way, on or over the land, should be shown or noted on the plat. If the land is described by metes and bounds, or by lands of adjoining owners, abutting streets, ways, etc., its boundaries should be defined on the plat by courses, distances, and monuments, natural or otherwise, and the ownership and contiguous boundaries of adjoining lands and names of abutting streets, ways, etc. When the land is part of a subdivision, a copy of the subdivision plat, or the section thereof in which the land is located, should be submitted. If necessary to identify the land with a United States patent or a state grant which is the source of title, a plat of the land being acquired should be superimposed on a copy of the plat of the United States survey or state grant. If the land being acquired is part of a larger tract described in an abstract, it should, when necessary for its identification, be shown drawn to a common scale on a map showing the larger tract and any successive diminishing tracts.

SUPPLEMENTAL AND SUPPORTING TITLE EVIDENCE

The closing of transactions is often delayed due to failure to supply necessary supporting title data. Requirements covering some of these items are indicated below.

Sales by Corporations

Private corporations.—The title evidence should contain or be accompanied by sufficient portions of the charters or other records of corporations, conveying to the United States, to determine the power of the corporations to hold and convey real estate and the validity of such conveyances. In jurisdictions where franchise taxes are a lien, or where nonpayment of such taxes or failure to file required reports or statements suspends or terminates a corporation's power to do business or transfer property, the title evidence should also be accompanied by a certificate or statement of the proper state officer showing payment of such taxes and that the corporation is in good standing. A certified copy of the resolution of the proper corporate body, authorizing the conveyance to the United States, is required. In case of conveyances of all or substantially all of the real estate of such a corporation, a certified copy of a resolution authorizing the conveyance, enacted in compliance with pertinent statutory requirements at a meeting of stockholders, is necessary.

Public corporations.—Where the title evidence discloses a public corporation as grantor in the chain of title, or the vendor to the United States is a public corporation, the title evidence should include or be accompanied by sufficient portions of the charter, resolutions, or other source of authority of each such corporation to convey land, and also with evidence of compliance with all statutory requirements necessary to the transfer of a valid title.

Determination of Heirship

When the conveyance to the United States is by the intestate's heirs and there has been no judicial determination of heirship, the fact that the grantors are all the heirs of the deceased must be judicially established where practicable. If such judicial determination is impracticable, proof of heirship must be shown by acceptable affidavits (see form on page 18) of the grantors and, if possible, of two or more disinterested reputable persons having knowledge of the facts.

Adverse Possession

Evidence of adverse possession, when required, must include satisfactory affidavits of possession, which shall contain the following:

- (a) Execution by three or more reputable persons living in the vicinity of the land and having no interest in the sale of the property;

(b) Identification of the land and a statement of the character, extent, and duration of possession for at least as long as the maximum local statutory period of limitations, prescriptions, or adverse possession, but not less than 22 years; and

(c) All necessary facts fully set out, together with convincing proof of the establishment of title by adverse possession under local law. The affidavits should not contain mere conclusions of the affiants.

In cases where large tracts of land are being acquired which embrace what formerly were smaller tracts, the affidavits of adverse possession must relate specifically to the component parts of such tracts and contain sufficient facts to establish adverse possession to each such part.

Where two or more grants, patents, or transfers affect the same land, the exact location of the land over which the acts of possession are relied upon must be shown on a map and by the affidavits.

Where the acquiring agency does not contemplate acquisition of the land subject to mineral, or other rights or easements of any kind appearing in the chain of title, such affidavits must show convincing proof of adverse possession against any and all such rights or interests.

Unrecorded Title Papers

In all cases any unrecorded title papers and copies of resolutions, ordinances, and title opinions containing references to statutes or cases in point relating to the condition of the title or objections thereto with respect to such land, which may be available to the vendor, should accompany the title evidence.

Final and Continuation Title Evidence

(a) In direct purchases:

(1) Abstracts must be continued to and including the recordation of the deed to the United States and any necessary curative data.

(2) Final certificates of title or title insurance policies must be based on a search of the records from the dates of the preliminary certificate reports or title binders to the date of the recordation of the deed to the United States, which must certify to or guarantee the title of the United States, which was acquired under the deed.

(b) In condemnation cases:

(1) The abstract must be continued to the date of the filing of *lis pendens* or other notice in the proceedings.

(2) A supplemental certificate of title or continuation title

report binder or endorsement based on a search of the records to the date of the filing of notice in the condemnation proceeding must be obtained. No final certificate or policy is required provided the preliminary certificate report or binder does not limit the title company's liability or the company assumes the required financial liability and the certificate, report or binder contains no provision under which the issuing company denies liability for losses if the final certificate or policy is not issued.

Deed to the United States

The deed to the United States should conform to local statutory requirements and generally adhere to the following requirements:

- (a) Be a general warranty deed; however, this requirement may be waived, upon a proper showing, as to conveyances by states, municipal corporations, and fiduciaries and other persons acting solely in a representative capacity.
- (b) Disclose the capacity in which any grantor acts who conveys in other than an individual capacity.
- (c) Show the name of the grantor in the body of the deed and its acknowledgment, be signed by him, exactly as his name appears as grantee in the conveyance to him; and account for any unavoidable difference by a recital identifying the grantor with the grantee in the preceding conveyance.
- (d) Disclose the marital status of each grantor.
- (e) Recite the true consideration and the receipt thereof.
- (f) Convey the land to the "United States of America and its assigns."
- (g) Contain a proper description of the land.
- (h) Convey all the right, title and interest of the grantor in and to any alleys, streets, ways, strips, or gores abutting or adjoining the land.
- (i) Contain no reservations or exceptions not approved by the department or agency of the Government acquiring the land; however, when land is to be conveyed subject to certain rights, such as easements or mineral rights thought to be outstanding in third parties, they must not be *excepted* from the conveyance, but the deed should be framed to convey all the grantor's right, title, and interest *subject to* the outstanding rights, unless the contract or option expressly provides otherwise.
- (j) Refer to the deed(s) to the grantor(s), or other source of grantor's title, by book, page, and place of record, wherever customary or required by statute.
- (k) Contain a reference to the name of the agency for which

the lands are being acquired. This statement should follow the description of the land and in no instance should it be included in the granting, habendum or warranty provisions of the deed.

(l) Release all rights of homestead, dower, curtesy, and other interests of the grantor's spouse, as required by local law.

(m) Be signed, sealed, attested, and acknowledged by all grantors and their spouses, as required by local law.

(n) If executed by a corporation, be signed in the full and correct name of the corporation by its duly authorized officer or officers, sealed with the corporate seal, attested and acknowledged, as required by local law.

(o) If executed by an attorney in fact be signed in the name of the principal by the attorney, properly acknowledged by the attorney as the free act and deed of the principal, and be accompanied by the original or a certified copy of the power of attorney and satisfactory proof that the principal was living and the power in force at the time of its exercise.

(p) Have affixed sufficient documentary revenue stamps.

Certificate of Possession

There must be submitted, as part of the title evidence, a certificate of possession, based on an inspection and inquiry made at the time of the closing of the purchase or as of the date of taking in condemnation, by a duly authorized employee of the acquiring agency, or by an attorney of the Department of Justice. The certificate of possession must be in form approved by the Department of Justice. The standard form of certificate (see form on page 16) should be used in all acquisitions.

The interest or claim of any persons other than the record owners who are occupying or using any part of the lands should be ascertained and if possible disclaimers should be obtained from such persons (see form on page 17). In the event such person or persons claim other than a tenant's or lessee's interest a quitclaim deed should be obtained and recorded.

CERTIFICATE OF TITLE

Name of title company ----- Address -----

To (----- and) United States of America:

The -----, a Corporation organized and existing under the laws of the State of -----, with its principal office in the City of -----, certifies that it has [made] [obtained a report showing] a thorough search of the title to the

property described in Schedule A hereof, beginning with the ----- day of -----, 19----, and hereby certifies that the title to said property was indefeasibly vested in fee simple of record in ----- as of the ----- day of -----, 19----, free and clear of all encumbrances, defects, interests, and all other matters whatsoever, either of record or otherwise known to the corporation, impairing or adversely affecting the title to said property, except as shown in Schedule B hereof.

The maximum liability of the undersigned under this certificate is limited to the sum of \$-----.

In consideration of the premium paid, this certificate is issued for the use and benefit of (said ----- and) the United States of America (and each of them).

In Witness Whereof, said Corporation has caused these presents to be signed in its name and behalf, sealed with its corporate seal, and delivered by its proper officers thereunto duly authorized, as of the date last above mentioned.

(Name of title company)

By -----
(Title of executing officer)

Attest:

(Title of attesting officer)

SCHEDULE A

The property covered by this certificate is accurately and fully described as follows -----

SCHEDULE B

The property described in Schedule A hereof is free and clear from all interests, encumbrances, and defects of title and all other matters whatsoever of record, or which, though not of record, are known to this corporation to exist, impairing or adversely affecting the title to said property, except the following:

CERTIFICATE OF INSPECTION AND POSSESSION

I, _____ a _____ of the Department of _____, hereby certify that on the _____ day of _____, 19____, I made a personal examination and inspection of that certain tract or parcel of land situated in the County of _____, State of _____, designated as Tract No. _____, and containing _____ acres (proposed to be) acquired by the United States of America in connection with the _____ Project, from _____

(In the condemnation proceeding entitled _____ Civil No. _____.)

1. That I am fully informed as to the boundaries, lines and corners of said tract; that I found no evidence of any work or labor having been performed or any materials having been furnished in connection with the making of any repairs or improvements on said land; and that I made careful inquiry of the above-named vendor (and of the occupants of said land) and ascertained that nothing had been done on or about said premises within the past _____ months that would entitle any person to a lien upon said premises for work or labor performed or materials furnished.

2. That I also made inquiry of the above-named vendor (and of all occupants of said land) as to his (their) rights of possession and the rights of possession of any person or persons known to him (them), and neither found any evidence nor obtained any information showing or tending to show that any person had any rights of possession or other interest in said premises adverse to the rights of the above-named vendor or the United States of America.

3. That I was informed by the above-named vendor (and by all other occupants) that to the best of his (their) knowledge and belief there is no outstanding unrecorded deed, mortgage, lease, contract, or other instrument adversely affecting the title to said premises.

4. That to the best of my knowledge and belief after actual and diligent inquiry and physical inspection of said premises there is no evidence whatever of any vested or accrued water rights for mining, agricultural, manufacturing, or other purpose; nor any ditches or canals constructed by or being used thereon under authority of the United States, nor any exploration or operations whatever for the development of coal, oil, gas, or other minerals on said lands; and that there are no possessory rights now in existence owned or being

actively exercised by any third party under any reservation contained in any patent or patents heretofore issued by the United States for said land.

5. That to the best of my knowledge and belief based upon actual and diligent inquiry there is no outstanding right whatsoever in any person to the possession of said premises nor any outstanding right, title, interest, lien, or estate, existing or being asserted in or to said premises except such as are disclosed and evidenced by the public records.

6. That said premises are now wholly unoccupied and vacant except for the occupancy of ----- as tenant(s) at will, from whom disclaimer(s) of all right, title, and interest in and to said premises, executed on the ----- day of -----, 19----, has (have) been obtained. The property is also occupied by the following:

Name Interest claimed
Dated this ----- day of -----, 19----
Approved:

DISCLAIMER

County of -----
State of ----- ss:

We (I) ----- (wife) (husband), being first duly sworn, depose and say (deposes and says) that we are (I am) occupying all (a part) of the land (proposed to be) acquired by the United States of America from -----, described as ----- acres, Tract No. -----, lying in ----- County, State of -----, and do hereby aver that we are (I am) occupying said land as the tenants (tenant) of -----; that we (I) claim no right, title, lien or interest in and to the above-described premises or any part thereof by reason of said tenancy or otherwise and will vacate said premises upon demand for the possession of said lands by the United States of America.

Dated this ----- day of -----, 19----

Witnesses: ----- (Tenant)
----- (Spouse)

AFFIDAVIT OF HEIRSHIP

I, _____, residing

 (Name of affiant)
 at _____ in _____

 (Street and number)
 _____, _____, _____
 (City or town) (State) (County)
 being of full legal age, for the purpose of establishing the legal
 ownership of certain land in _____,
 _____ (City or town)
 _____, _____, proposed
 (County) (State)
 to be purchased by the United States of America from all the lawful
 heirs of _____
 _____ (Name of decedent)
 late of _____
 _____ (City or town) _____ (County)
 _____, who died on the _____ day of
 _____ (State), 19____, at the age of ___ years, a resident of
 _____ (City or town) _____ (County) _____ (State),
 on oath depose and say as follows:

(1) That I was personally acquainted with the above-named
 decedent for the period of _____ years from _____
 19,___ until his death, and that my relationship to said decedent
 was _____.

(2) That said decedent was married to but once and then to
 _____ at _____
 _____ (Spouse)
 in 19____, who [survived] [predeceased]. (The affiant should cross
 out any statement enclosed in brackets which is not applicable to said
 decedent.)

(3) That the following is a list of the full names, relationships to
 the decedent, ages, marital status, and addresses of all surviving
 issue or other heirs of said decedent:

Full name	Relationship to decedent	Age	Married to	Address
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

(4) [That said decedent left no will, no issue, or no collateral heirs other than those named above and no unpaid debts or claims except as stated below.] (All statements made by the affiant will be considered to be made on the affiant's personal knowledge unless the contrary is expressly indicated.) [That I have made careful inquiry and that to the best of my information and belief said decedent left no will, no issue, or no collateral heirs other than those named above, and no unpaid debts or claims except as stated below.] (The affiant should cross out any statement enclosed in brackets which is not applicable.)

(Unpaid debts)

(5) That the value of the decedent's entire estate at death, including all property, real and personal, then owned by the decedent, did not exceed \$-----, and that all funeral expenses and debts against the estate have been paid.

(6) That I am [not] interested financially or by reason of relationship to said decedent in the proposed conveyance to the United States of America in connection with which this affidavit is furnished, and understand that it is secured for the purpose of inducing the United States to purchase land owned by said decedent.

-----, 19-----
-----, ss:
-----,

Then personally appeared before me the above-named -----
-----, who subscribed the foregoing affidavit and made oath that the statements contained therein are true.

(Title)

POLICY OF TITLE INSURANCE

Issued by

BLANK TITLE INSURANCE COMPANY

Policy Number ----- Amount \$-----

Blank Title Insurance Company, a blank corporation, herein called the Company, for a valuable consideration -----

----- **HEREBY INSURES** -----

The United States of America

hereinafter called the Insured, against loss or damage not exceeding _____ dollars, together with costs and expenses which the Company may become obligated to pay as provided in the Conditions and Stipulations hereof, which the Insured shall sustain by reason of:

any defect in or lien or encumbrance on the title to the estate or interest covered hereby in the land described or referred to in Schedule A, existing at the date hereof, not shown or referred to in Schedule B or excluded from coverage by the General Exceptions;

All subject, however, to the provisions of Schedules A and B and to the General Exceptions and to the Conditions and Stipulations hereto annexed; all as of the _____ day of _____, 19____, the effective date of this policy.

In Witness Whereof, Blank Title Insurance Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers.

Countersigned:

BLANK TITLE INSURANCE COMPANY
By _____
President
By _____
Secretary

SCHEDULE A

1. The estate or interest in the land described or referred to in this schedule covered by this policy is:

(Will be shown as a fee or such lesser estate or interest owned by the person or party named in paragraph 2 of this Schedule.)

2. Title to the estate or interest covered by this policy at the date hereof is vested in:

3. The land referred to in this policy is situated in the County of _____, State of _____, and is described as follows:

(This phraseology may be modified to eliminate a specific description by including it by reference to the description as contained in a specific instrument.)

SCHEDULE B

This policy does not insure against loss or damage by reason of the following:

1. Current and delinquent taxes and assessments as follows:
(List all taxing districts in which the land is situated and other taxing authorities that have jurisdiction over said land for the levy of taxes; showing lien date for each and amounts for all such assessments that have not been paid on the date of the policy.)
2. (Continue with the Special Exceptions such as recorded easements, liens, etc., showing in addition the persons or parties holding such interests of record, and who the Company would require to convey such interest or who would be the proper parties defendant in a condemnation proceeding to eliminate such matter.

The writeup could be substantially as follows:

An easement for road purposes conveyed to _____
_____, by deed recorded
_____.)

GENERAL EXCEPTIONS
Governmental Powers

1. Because of limitations imposed by law on ownership and use of property, or which arise from governmental powers, this policy does not insure against:

(a) consequences of the future exercise or enforcement or attempted exercise or enforcement of police power, bankruptcy power, or power of eminent domain, under any existing or future law or governmental regulation; (b) consequences of any law, ordinance or governmental regulation, now or hereafter in force (including building and zoning ordinances), limiting or regulating the use or enjoyment of the property, estate or interest described in Schedule A, or the character, size, use or location of any improvement now or hereafter erected on said property.

Matters Not of Record

2. The following matters which are not of record at the date of this policy are not insured against:

- (a) rights or claims of parties in possession not shown of record;
- (b) questions of survey;
- (c) easements, claims of easement or mechanics' liens where no notice thereof appears of record; and

(d) coveyances, agreements, defects, liens or encumbrances, if any, where no notice thereof appears of record; provided, however, the provisions of this subparagraph 2(d) shall not apply if title to said estate or interest is vested in the United States of America on the date hereof.

Matters Subsequent to Date of Policy

3. This policy does not insure against loss or damage by reason of defects, liens or encumbrances created subsequent to the date hereof.

Refusal to Purchase

4. This policy does not insure against loss or damage by reason of the refusal of any person to purchase, lease or lend money on the property, estate or interest described in Schedule A.

CONDITIONS AND STIPULATIONS

Notice of Actions

1. If any action or proceeding shall be begun or defense asserted which may result in an adverse judgment or decree resulting in a loss for which this Company is liable under this policy, notice in writing of such action or proceeding or defense shall be given by the Attorney General to this company within 90 days after notice of such action or proceeding or defense has been received by the Attorney General; and upon failure to give such notice then all liability of this Company with respect to the defect, claim, lien or encumbrance asserted or enforced in such action or proceeding shall terminate. Failure to give notice, however, shall not prejudice the rights of the party insured, (1) if the party insured shall not be a party to such action or proceeding, or (2) if such party, being a party to such action or proceeding be neither served with summons therein nor have actual notice of such action or proceedings, or (3) if this Company shall not be prejudiced by failure of the Attorney General to give such notice.

Notice of Writs.

2. In case knowledge shall come to the Attorney General of the issuance or service of any writ of execution, attachment or other process to enforce any judgment, order or decree adversely affecting the title, estate or interest insured said party shall notify this company thereof in writing within 90 days from the date of such knowledge; and upon a failure to do so, then all liability of this

Company in consequence of such judgment, order or decree or matter thereby adjudicated shall terminate unless this Company shall not be prejudiced by reason of such failure to notify.

Defense of Claims

3. This Company agrees, but only at the election and request of the Attorney General of the United States, to defend at its own cost and expense the title, estate or interest hereby insured in all actions or other proceedings which are founded upon or in which it is asserted by way of defense, a defect, claim, lien or encumbrance against which this policy insures, provided, however, that the request to defend is given within sufficient time to permit the Company to answer or otherwise participate in the proceeding. If any action or proceeding shall be begun or defense be asserted in any action or proceeding affecting or relating to the title, estate or interest hereby insured and the Attorney General elects to defend at the Government's expense, the Company shall upon request, cooperate and render all reasonable assistance in the prosecution or defense of such proceeding and in prosecuting appeals.

If the Attorney General shall fail to request and permit the Company to defend, then all liability of the Company with respect to the defect, claim, lien or encumbrance asserted in such action or proceeding shall terminate; provided, however, that if the Attorney General shall give the Company timely notice of all proceedings and an opportunity to suggest such defenses and actions as it shall conceive should be taken and the Attorney General shall present the defenses and take the actions of which the Company shall advise him in writing, then the liability of the Company shall continue; but in any event the Company shall permit the Attorney General without cost or expense to use the information and facilities of the Company for all purposes which he thinks necessary or incidental to the defending of any such action or proceeding or any claim asserted by way of defense therein and to the prosecuting of an appeal.

Compromise of Adverse Claims

4. Any compromise, settlement or discharge by the United States or its duly authorized representative of an adverse claim, without the consent of this Company shall bar any claim against the Company hereunder; provided, however, that the Attorney General may at his election submit to the issuing company for approval or disapproval any proposed compromise, settlement or discharge of any adverse claim and in the event of the consent of the issuing

company to the proposed compromise, settlement or discharge it shall be liable for the payment of the full amount paid.

Statement of Loss

5. A statement in writing of any loss or damage sustained by the party insured, and for which it is claimed this Company is liable under this policy, shall be furnished by the Attorney General to this Company within 90 days after said party has notice of such loss or damage and no right of action shall accrue under this policy until 30 days after such statement shall have been furnished. No recovery shall be had under this policy unless suit be brought thereon within one year after said period of 30 days. Failure to furnish such statement of loss or to bring such suit within the times specified shall not affect the Company's liability under this policy unless this Company has been prejudiced by reason of such failure to furnish a statement of loss or to bring such suit.

Policy Reduced by Payments of Loss

6. All payments of loss under this policy shall reduce the amount of this policy pro tanto.

Amendment of Policy

7. No provision or condition of this policy can be waived or changed except by writing endorsed hereon or attached hereto signed by the President, a Vice President, the Secretary, and Assistant Secretary or other validating officer of the Company.

Notices, Where Sent

8. All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at (insert proper address).

ENDORSEMENT

Attached to Policy No.

Issued by

BLANK TITLE INSURANCE COMPANY

1. Schedule A of the above policy is hereby amended in the following particulars:

(a) Paragraph 1 of Schedule A is hereby deleted and the following is substituted:

1. The estate or interest in the land described or referred to in this Schedule covered by this policy it:
(An easement for -----.)

(b) Paragraph 2 of Schedule A is hereby deleted and the following is substituted:

2. Title to the estate or interest covered by this policy at the date hereof is vested in:

THE UNITED STATES OF AMERICA

(Follow with appropriate reference to Declaration of Taking or Deed.)

(c) Paragraph 3 of Schedule A is hereby deleted and the following is substituted:

3. The land referred to in this policy is situated in the County of -----, State of -----, and is described as follows:

(Here give description of land actually acquired.)

2. Schedule B of the above policy is hereby amended in the following particulars:

(a) Paragraphs numbered ----, ----, ---- and ---- of Schedule B are hereby deleted.

(Enumerate those paragraphs eliminated by proper releases, conveyances, etc.)

(b) Schedule B of the above policy is amended by adding the following paragraphs numbered ---- to ----, inclusive.

3. Subparagraph 2(d) of the General Exceptions of the above policy is hereby deleted.

4. The effective date of the above policy is hereby extended to -----

(Date of recording of Deed or Notice of Action, since no insurance is to be afforded as to regularity of proceedings.)

The total liability of the Company under said policy and this endorsement thereto shall not exceed, in the aggregate, the sum of \$---- and costs which the Company is obligated under the Conditions and Stipulations thereof to pay.

This endorsement is made a part of said policy and is subject to the Schedules, General Exceptions and the Conditions and Stipulations therein, except as modified by the provisions hereof.

Dated:

BLANK TITLE INSURANCE COMPANY,

By -----
(Authorized officer)

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